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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

MARK ROBERTSON,
Petitioner,

V.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED

1 Did the Court of Appeals err in holding that the state court reasonably applied *Beck v. Alabama* in upholding the denial of a jury instruction on the lesser included offense of murder?

2 Is an instruction in a capital case that requires jurors to render an untruthful verdict in order to give effect to mitigating evidence unconstitutional?

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PETITION FOR A WRIT OF CERTIORARI

Mark Robertson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus is reported at 234 F.3d 890 (Appendix A). The order of the Court of Appeals denying rehearing is not reported (Appendix B). The findings, conclusions, and recommendation of the United States Magistrate Judge is not reported (Appendix C). The order of the District Court adopting the Magistrate Judge's findings, conclusions, and recommendation is not reported (Appendix D). The order of the Texas Court of Criminal Appeals denying habeas corpus relief is not reported (Appendix E). The opinion of the Texas Court of Criminal Appeals affirming the conviction on direct appeal is reported at 871 S.W.2d 701 (Appendix F).

JURISDICTION

The Fifth Circuit affirmed the District Court's denial of habeas corpus relief on December 4, 2000, and denied rehearing on January 3, 2001. This petition is being filed within 90 days of that order. This Court's jurisdiction rests on 28 U.S.C. § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, " No State shall . . . deprive any person of life . . . without due process of law . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

On the evening of August 19, 1989, petitioner shot and killed Sean Hill while they were fishing at a pond behind the house of Hill's grandmother, Edna Brau. Petitioner then entered the house, shot and killed Ms. Brau, and stole her purse and car. He was arrested in Las Vegas, Nevada, nine days later. He gave a written confession admitting that he committed the murders and then stole the property.

Petitioner was charged with capital murder pursuant to an indictment that alleged that he killed Ms. Brau while in the course of robbing her. Had the jury concluded, or had a reasonable doubt, that he killed her because he was sociopathic, high on drugs, or wanted to eliminate her as a potential witness to the murder of Hill, and that he thereafter decided to steal her property, he would have been guilty only of murder, a non-capital offense. However, because the trial court refused to instruct the jury on murder, the jury only had the options of convicting him of capital murder or acquitting him. A jury properly instructed on murder could have found him guilty based on a reasonable doubt as to whether he formed the intent to steal Ms. Brau's property before he killed her. Thus, the trial court's refusal to instruct the jury on murder violated the Eighth and Fourteenth Amendments.

The jurors took the statutory oath required by article 35.22 of the Texas Code of Criminal Procedure to render a true verdict according to the law and the evidence. The trial court instructed the jury in the punishment charge that even if it believed that the answer to a statutory special issue should be "yes," it should answer "no" if it wanted to impose a life sentence based on the mitigating evidence. The trial court overruled petitioner's objection that this instruction nullified the statutory jury oath and denied his request to submit a special issue asking whether the jury wanted to impose a life sentence in view of any mitigating evidence. The nullification instruction violated the Eighth and Fourteenth Amendments because it arbitrarily and capriciously forced the jurors either to abide by their oaths and disregard mitigating evidence that made a death sentence inappropriate or to give a false answer to a statutory special issue.

B. Procedural History

Petitioner was charged with capital murder in Dallas County, Texas. He pled not guilty. A jury convicted him and gave affirmative answers to the statutory special issues. The court assessed his punishment at death on February 11, 1991.

The Texas Court of Criminal Appeals affirmed the conviction on December 8, 1993, and denied rehearing on March 9, 1994. The Supreme Court denied certiorari on October 3, 1994. *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim.App. 1993), *cert. denied*, 513 U.S. 853 (1994).

Petitioner filed a state habeas corpus petition on April 14, 1997. The district conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended that relief be denied. The Texas Court of Criminal Appeals denied relief on November 18, 1998. *Ex parte Robertson*, Writ No. 30,077 - 1 (Tex. Crim. App. 1998).

Petitioner filed a federal habeas corpus petition in the United States District Court for the Northern District of Texas on November 23, 1998. The Magistrate Judge recommended that relief be denied on March 20, 2000. The District Court adopted the Magistrate Judge's findings, conclusions, and recommendation, denied relief on April 28, 2000, and denied a certificate of appealability on May 15, 2000.

Petitioner filed a motion for a certificate of appealability in the United States Court of Appeals for the Fifth Circuit on June 26, 2000. The Fifth Circuit denied the motion, affirmed the denial of habeas corpus relief on December 4, 2000, and denied rehearing on January 3, 2001. *Robertson v. Johnson*, 234 F.3d 890 (5th Cir. 2000).

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATE COURT REASONABLY APPLIED *BECK V. ALABAMA* IN UPHOLDING THE DENIAL OF A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF MURDER.

Due process requires that the trial court give a lesser included offense instruction if the evidence would permit the jury rationally to acquit the defendant of the greater offense and to convict him of the lesser offense. *Keeble v. United States*, 412 U.S. 205, 208 (1973). In a capital case, a death sentence may not constitutionally be imposed where the jury is not permitted to consider a lesser included offense supported by the evidence. *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the jury was given the options of convicting the defendant of capital

murder or acquitting him, as Alabama law prohibited a jury instruction on murder in a capital case, even where supported by the evidence. This Court held that the failure to provide the third option of a murder conviction unacceptably enhanced the risk of an unwarranted conviction for capital murder. The goal of the *Beck* rule is "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984).

The Texas Court of Criminal Appeals held on appeal that petitioner was not entitled to a charge on murder because a rational jury would consider the totality of the evidence "as probative of [his] intent to steal from Ms. Brau before or as he murdered her." *Robertson*, 871 S.W.2d at 707. The court maintained that position in the state habeas corpus proceeding. The Fifth Circuit found that "the state habeas court's legal analysis was appropriately premised upon the Supreme Court's decision in *Beck*" and that petitioner had not cited "any other Supreme Court authority capable of calling the state habeas court's reliance upon [*Beck*] or its application of that case unreasonable." *Robertson*, 234 F.3d at 898.

The Fifth Circuit used an erroneous standard of review to the extent that it required petitioner to cite Supreme Court authority to demonstrate that the state habeas court's application of *Beck* was unreasonable. This Court rarely, if ever, takes the opportunity to apply its own precedent; that responsibility is delegated to the lower courts. The Fifth Circuit's decision in *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir.), *cert. denied*, 486 U.S. 1061 (1988), demonstrates that the state court did unreasonably apply *Beck*. The panel opinion in petitioner's case did not even mention *Cordova*, implicitly concluding that a federal court cannot consider federal circuit authority in deciding whether a state court unreasonably applied

Supreme Court precedent. This Court should grant certiorari to resolve this important federal question. SUP. CT. R.10(c).

Cordova was convicted of capital murder and sentenced to death after the trial court refused to instruct the jury on murder. The Court of Criminal Appeals affirmed, observing that the defendant did not testify or offer any evidence that might reasonably support a conviction for murder. *Cordova v. State*, 698 S.W.2d 107 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1101 (1986). On federal habeas review, the Fifth Circuit framed the issue as whether a rational jury could have found that the murder was not committed in the course of a robbery. The court concluded that because there were competing inferences as to whether the defendant had previously agreed with his co-defendants to rob the complainant, and the evidence of his prior intent to commit robbery was circumstantial and ambiguous, the denial of an instruction on murder violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. *Cordova*, 838 F.2d at 767. *Cf. Vickers v. Ricketts*, 798 F.2d 369 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (denial of due process in capital case to refuse instruction on murder where jury rationally could have concluded that killing was not premeditated); *Hogan v. Gibson*, 197 F.3d 1297 (10th Cir. 1999), *cert. denied*, __ U.S. __, 121 S.Ct. 332, 148 L.Ed.2d 267 (2000) (denial of due process in capital case to refuse instruction on manslaughter where defendant's confession raised provocation).

Petitioner does not question the state court finding that there was sufficient evidence to establish that he formed the intent to rob Ms. Brau before he shot her. However, the Fifth Circuit erred in relying on the incorrect state court finding that there was no evidence from which the jury could have found that he formed the intent to rob Ms. Brau after he shot her. *Robertson*, 234 F.3d at 898.

Petitioner said in his written confession that he shot Hill at a pond in the yard, entered the house, splashed water in his face, walked into the den, shot Ms. Brau, and then stole her property. *Robertson*, 234 F.3d at 893. The jury rationally could have concluded that after petitioner shot Hill, he entered the house to steal property and to kill Ms. Brau; in this scenario, he was guilty of the capital murder of Ms. Brau. Conversely, the jury rationally could have concluded, or had a reasonable doubt, that he killed Ms. Brau because he was sociopathic, high on drugs, or wanted to eliminate her as a potential witness to the murder of Hill, and that he thereafter decided to steal her property; in this scenario, he was guilty of murder. It was for a properly instructed jury, not the trial court, to determine which inference to make.

This Court should grant certiorari to determine whether the state court unreasonably applied *Beck* in concluding that petitioner was not entitled to a jury instruction on murder, and whether, pursuant to 28 U.S.C. § 2254 (d)(1), a federal court can consider federal circuit authority in determining whether the state court unreasonably applied "clearly established Federal law, as determined by the Supreme Court of the United States." If the jury could have had a reasonable doubt, based on petitioner's written confession and the inferences that could be drawn therefrom, that he formed the intent to steal Ms. Brau's property after he killed her, he was entitled to a charge on murder under the rationale of *Beck* and *Cordova*. The denial of an instruction on murder violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATE COURT REASONABLY APPLIED *PENRY V. LYNAUGH* IN UPHOLDING THE SUBMISSION OF A JURY NULLIFICATION INSTRUCTION.

The jurors took the statutory oath required by article 35.22 of the Texas Code of Criminal Procedure:

> You and each of you solemnly swear in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God.

The trial court submitted at the punishment stage the special issues required by article 37.071 (b)(1) and (2) of the Texas Code of Criminal Procedure inquiring whether petitioner deliberately killed Ms. Brau and whether he would probably commit acts of violence that would constitute a continuing threat to society. The court provided the following "nullification" instruction in the punishment charge (Trial Tr. 314):

> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the

> State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

The court overruled petitioner's objection that this instruction nullified the statutory jury oath to render a true verdict based on the law and the evidence, and it denied his request to submit a special issue asking whether the jury wanted to impose a life sentence in view of any mitigating evidence (Trial Tr. 282-83; 64 S.R. 61-63).

The Texas Court of Criminal Appeals has held that this nullification instruction is adequate to avoid the constitutional infirmity condemned by *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), as there is no reasonable likelihood that a jury could apply the instruction in a way that prevented the consideration of constitutionally relevant evidence. *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 941 (1993). The court did not cite any authority for the proposition that a constitutional defect in a statutory death penalty scheme can be cured by instructing the jurors to violate their oaths and return a false answer to a special issue. The nullification instruction in petitioner's case was upheld in reliance on *Fuller*. *Robertson*, 871 S.W.2d at 710-11.

The Fifth Circuit observed that in *Penry I*, this Court did not specify what instructions trial courts should give to juries regarding mitigating evidence. *Robertson*, 234 F.3d at 898-99. Until the Texas Legislature amended the capital murder punishment statute to require a *Penry* special issue, Texas courts approached this issue on a case-by-case basis. *Id.* at 899. Because this Court has not specifically held that the Texas nullification instruction constitutes an unreasonable application of *Penry I*, the Fifth Circuit upheld the nullification instruction given at Penry's retrial and at petitioner's trial. *Penry v.*

Johnson, 215 F.3d 504, 508-09 (5th Cir. 2000) (*Penry II*); *Robertson*, 234 F.3d at 899. The opinion in petitioner's case, issued on December 4, 2000, relied on *Penry II* even though this Court had granted Penry's certiorari petition on November 27, 2000. *Penry v. Johnson*, __ U.S. __, 121 S.Ct. 563, 148 L.Ed.2d 483 (2000).[1]

The nullification instruction violated the Eighth and Fourteenth Amendments because it arbitrarily and capriciously forced the jurors either to abide by their oaths and disregard mitigating evidence that made a death sentence inappropriate or to give a false answer to a statutory special issue. The Eighth Amendment requires consideration of mitigating evidence in order to prevent jurors from arbitrarily nullifying the law to dispense mercy. *Woodson v. North Carolina*, 428 U.S. 280, 293, 302-04 (1976). It is arbitrary and capricious to require a jury to return a false verdict in order to avoid the death penalty. *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976).

Although this Court has not specifically held that the Texas nullification instruction constitutes an unreasonable application of *Penry I*, it has held that a similarly flawed instruction was a constitutionally inadequate vehicle for dispensing mercy. In *Roberts v. Louisiana*, the jury was instructed to consider crimes other than first degree murder "even if there [was] not a scintilla of evidence to support the lesser verdicts."[2] This Court disapproved of the instruction:

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[1] *Penry II* also raised the issue of whether an instruction that requires jurors to render an untruthful verdict in order to give effect to mitigating evidence is unconstitutional. Petition for Writ of Certiorari at 20.

[2] Petitioner's jury was instructed to answer "no" to a special issue, even if the evidence did not support such an answer, if it wanted to spare his life.

> This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the [law].

428 U.S. at 334-35. "The Eighth Amendment . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited." *Id.* at 336. *Cf. Beck v. Alabama*, 447 U.S. at 644 (jurors "should not be expected to make such lawless choices").

Jury nullification is " a violation of a juror's oath to apply the law as instructed by the court – in the words of the standard oath administrated to jurors..., to render a true verdict according to the law and the evidence." *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997). This Court prohibited jury nullification in *Sparf v. United States*, 156 U.S. 51 (1895). In *People v. Fernandez*, 26 Cal. App. 4th 710, 31 Cal.Rptr.2d 677 (1994), the California Court of Appeals observed:

> During the 19th century, most American courts, including the United States Supreme Court, rejected whatever precedent there was on instructing the jury on its power to nullify a verdict and chose to follow the contemporary English practice of not instructing the jury on the point and of not permitting the matter to be raised in argument to the jury [citation omitted]. Recent cases by the federal courts of appeals have reaffirmed this position [citation omitted].

26 Cal.App. 4th at 714-15, 31 Cal.Rptr.2d at 680.

Since *Sparf*, with the exception of the Texas nullification instruction in capital cases, courts consistently have refused to submit nullification instructions or to allow defendants to argue nullification to the jury. *See United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972). A nullification instruction undermines the impartial determination of justice based on the law. *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir.), *cert. denied*, 488 U.S. 832 (1988). Courts have categorically rejected the idea that "in a society committed to the rule of law, jury nullification is desirable or the courts may permit it to occur when it is within their authority to prevent." *United States v. Thomas*, 116 F.3d at 614. Neither the court nor counsel "should encourage jurors to violate their oath." *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983). A verdict based on nullification is "lawless, a denial of due process and ... an exercise of erroneously seized power." *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983). If a defendant is not entitled to a nullification instruction or to argue for nullification when he perceives it to be to his advantage, it is likewise impermissible to give the instruction over objection, when it is to his deteriment.

A nullification instruction makes judicial review to safeguard against capricious sentencing virtually impossible. *Sparf*, 156 U.S. at 101; *Roberts*, 428 U.S. at 335. In *Graham v. Collins*, 896 F.2d 893 (5th Cir. 1990), *rev'd on other grounds*, 950 F.2d 1009 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993), the Fifth Circuit, in *dictum*, expressed the belief that the submission of an additional special issue is required to permit a jury in a Texas capital case to give effect to all mitigating factors:

> The jury would certainly be confused by instructions that seem to be allowing a "no"

> answer even when the question itself calls for a "yes"answer. And if the [nullification] instruction should be given, modifying the plain meaning of the question, and if the jury answers "yes," how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question that was asked?

896 F.2d at 896-97, n.3.

The veniremen were questioned extensively during the voir dire examination on their ability to base their verdict on the law and the evidence, irrespective of their personal feelings or opinions. At the conclusion of jury selection, the jurors swore to render a true verdict according to the law and the evidence. The nullification instruction erroneously presumed that the jurors who took this oath before trial would disregard it at the punishment stage and give a false answer to a special issue to avoid the imposition of the death penalty.

The State introduced overwhelming evidence to support affirmative answers to the statutory special issues inquiring whether petitioner deliberately killed Ms. Brau and would probably pose a continuing threat to society. The defense presented mitigating evidence that he had been terrorized during his early childhood by an abusive, alcoholic father, had a significant drug problem, and was generally polite and respectful. None of this mitigating evidence compelled a negative answer to either special issue; at most, it perhaps suggested reasons for his antisocial behavior. The jury rationally could have decided, if given the opportunity, to impose a life sentence notwithstanding the affirmative answers to the statutory special issues, but it was unreasonable to expect the jury, in the face of overwhelming evidence, to return a false negative answer to either special issue.

It is impossible to insure that the jury actually considered and rejected all evidence mitigating against the death penalty, and gave effect to that evidence, where the nullification instruction modified the plain meaning of the special issues. The trial court was constitutionally required to submit an additional special issue instructing the jury that, notwithstanding affirmative answers to the statutory special issues, it could impose a life sentence on the basis of any mitigating evidence. *See State v. Wagner*, 786 P.2d 93 (Or.), *cert. denied*, 498 U.S. 879 (1990) (additional special issue constitutionally required to salvage Oregon death penalty statute, which was identical to Texas statute).

The Fifth Circuit erred in concluding that *Sparf* did not constitute binding Supreme Court authority that prohibited a jury nullification instruction. *Robertson*, 234 F.3d at 899, n. 3. The court cited the following language from *Penry II* to support its position:

> There is no doubt that an instruction permitting or encouraging the jury to avoid the controlling law would potentially raise serious or even insurmountable concerns. But the jury in this case "was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in *Penry I*."

Penry, 215 F.3d at 509.

The Fifth Circuit erred in relying on *Penry II*, which had already been vacated by the grant of certiorari. Moreover, instructing a jury to answer a special issue "no" in order to impose a life sentence due to mitigating evidence, even if the jury believes that the answer should be "yes," instructs the jury to disregard its oath to return a true verdict based on the law and the evidence. An instruction to give a false answer to a

special issue, despite the evidence, tells the jury how to disregard the law, not how to obey it. Certiorari should be granted to determine the constitutionality of the nullification instruction, an important federal question that the Fifth Circuit decided in a way that conflicts with relevant decisions of this court. SUP.CT.R. 10(c).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

Mark ROBERTSON,
Petitioner-Appellant,

v.

Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent-Appellee.

No. 00-10512.

United States Court of Appeals,
Fifth Circuit.
Dec. 4, 2000.

Appeal from the United States District Court for the Northern District of Texas.

Before HIGGINBOTHAM, DeMOSS and STEWARD, Circuit Judges.

DeMoss, Circuit Judge:

Petitioner Mark Robertson moves this Court for a certificate of appealability with respect to the district court's dismissal of his 28 U.S.C. § 2254 claims that his Texas state capital conviction was secured in violation of his Eighth and Fourteenth Amendment rights. Robertson seeks COA on two issues, both of which relate to the instructions given to the jury by the state trial court. Robertson first claims that the state trial court's refusal to charge the jury on the lesser included offense of murder (as opposed to capital murder, which is statutorily defined to include certain aggravating elements that justify

imposition of the death penalty in Texas) violated his Eighth and Fourteenth Amendment rights as set forth in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and its progeny. Robertson also claims that the trial court's decision to instruct the jury that it could answer one of the statutory special issues "no" (thus precluding assessment of the death penalty) if persuaded that mitigating evidence made the death penalty inappropriate, combined with the trial court's refusal to give the jury a third special issue expressly addressing the effect of mitigating evidence,violated his Eighth and Fourteenth Amendment rights as set forth in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), and its progeny. We deny Robertson's petition for COA as to both issues.

I. BACKGROUND

A. The Crimes

Robertson was convicted and sentenced to death for the August 19, 1989 capital murder of Edna Brau in the course of a robbery of her home. Robertson is also serving a life sentence for the murder of Brau's grandson Sean Hill in the course of the same incident. Robertson is also serving a life sentence for the murder of a 19-year-old convenience store clerk during the course of a robbery on August 9, 1989, shortly before the Brau and Hill murders. The facts relating to Robertson's offense, arrest, and subsequent convictions are as follows.

Edna Brau and her grandson, 19-year-old Sean Hill, were last seen alive on August 19, 1989, at Brau's Dallas, Texas home where both Brau and Hill lived. Hill's accommodations were in a separate wing of the house, with its own bath and an outside door providing independent access to the home. On the afternoon of August 20, 1989, Brau's daughter and son-in-law came to Brau's home and found her dead on the den sofa. Police later determined that Brau was shot once in the face. Hill

was found dead in a pond behind the house. Hill was shot once in the back of the head. Brau's belongings in her portion of the residence, including the den, master bedroom, master bedroom dressing area, kitchen, and dining room were in disarray, as though someone had rummaged through the house. Brau's purse, her car keys, the papers on her car, and her blue Cadillac were all missing, together with other personal belongings.

B. The Arrest and Subsequent Confessions

Eight days later, a Las Vegas police officer observed Robertson, accompanied by a male passenger, driving the stolen Cadillac on the Las Vegas strip. A NCIC computer check confirmed that the car was stolen and that the occupants might be armed and dangerous. Las Vegas police continued observing the car after it was parked in the parking lot of the Circus Circus casino. When Robertson and the passenger returned to the car, the police moved in to apprehend both men. The gun used to murder Brau and Hill was found in Brau's Cadillac.

At the arrest scene, Robertson informed police that they were lucky to have approached quickly, before he could retrieve the gun hidden under the seat. Robertson asked police where the television cameras were and whether he was on America's Most Wanted. When Las Vegas Sergeant Mark Medina inquired what he meant, Robertson confessed to Medina that he was on probation for robbery in Dallas and, further, that he had shot Edna Brau and her grandson, Sean Hill, in Dallas. Robertson told Sergeant Medina that he went to the house to see Hill, who had been a friend and drug supplier of Robertson's. Robertson claimed that he and Hill used some crank (crystal methamphetamine), and then went outside to go fishing.[1]

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[1] Contrary to Robertson's oral confession, the autopsy performed on Hill indicated that there were no drugs in Hill's body at the time of his death.

Robertson told Sergeant Medina that while Hill was fishing, he shot Hill once in the back of the head with a .38 caliber firearm. Robertson told Medina that he wanted to steal Hill's drugs. Robertson also told Medina that he went into Brau's portion of the home because he wanted to find money, jewelry, and the title to Brau's car, which he planned to sell later. Robertson shot Brau once in the head when he discovered her watching television on the couch in her den.[2]

Robertson also signed a written confession, in which he states:

> On Saturday night around 9 PM I decided to walk over to Sean's house on Hathaway where he lived with his grandmother. When I got there, Sean was in his room watching T.V. We sat around watched TV and did some pot and crank. We then decided to go fishing out in the back yard. We were using one stick with a string and a hook. We would trade off, I think we caught some seven catfishes. While we were fishing, I think we were kneeling. I pulled my gun out of my pants and shot Sean once in the head. After I shot him, Sean fell in the water. I then ran in the house through Sean's bedroom and into the bathroom where I splashed some water over my face. I then walked into the den where Mrs. Hill, Sean's grandmother, was watching TV and I shot her once. I unplugged the TV because it was playing and so was the radio in the bedroom.

I looked through her bedroom drawers and found her purse on the make-up counter. I saw some costume jewelry but left it alone. I did take a wristwatch which I later threw away in a garbage can but I don't remember where. I then ran into Sean's room and took his crank which was left on the bed. I

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[2] Robertson later made consistent oral confessions to other officers.

then drove off in Mrs. Hill's car. I went on home and then went to Showtime on Greenville and Lover's where I wiped it all down and left it there. I then walked back home. Next day while listening to the evening news I heard about their bodies being found. I couldn't sleep for the next couple of days so I figured that I would just leave. I walked back to the parking lot at Showtime where I got in the car and decided to drive to Las Vegas where my parents used to bring me. I had left the car in the parking lot. I threw the purse away in a dumpster at the Village Apts. I think that I left on Tuesday sometime around 4 PM. I drove all the way to Albuquerque, N. Mexico where I spent the night and the following day I drove to Vegas. I was staying at the SuLinda Motel in Vegas. I met Nikki two or three days later at the Circus-Circus. I used my roommate's money to get to Vegas. He had some $700.00 in cash in his room. I think that Mrs. Hill's purse had some $37.00 in cash which I took. These past few days I didn't know what to do and when I got arrested I felt relieved for the most part because I didn't have to run anymore.

II PROCEDURAL HISTORY

A. The Trial

Robertson was prosecuted in Texas for the three murders. With respect to Brau, Robertson was charged with capital murder committed in the course of a robbery. *See* Tex. Penal Code § 19.03(a)(2) (West 1990). Robertson pleaded not guilty to Brau's murder and was tried by a jury, which returned a verdict of guilty to the charge of capital murder. Robertson did not present any evidence during the guilt phase of his capital trial.

During the punishment phase, the state presented evidence, inter alia, relating to Robertson's past criminal behavior, which included serious vandalism at about age 12,

suspension for taking a loaded handgun to school at about age 13, car theft and destruction of property at about age 14, marijuana possession at about age 15, and a second marijuana possession resulting in conviction at about age 18, an aggravated robbery conviction involving a baseball bat and knife at about age 18, and thirteen cases of issuing bad checks at about age 19, after which he violated the terms of his probation on the aggravated robbery charge and the bad check charge by failing to report, failing to pursue drug counseling, and failing to perform community service. The state also presented extensive evidence relating to Robertson's murder of the 19-year-old convenience store clerk only ten days before he killed Brau and Hill. Finally, the state produced records of Robertson's bad prison behavior since incarceration on the charge, including evidence of an escape attempt and a fire he set in his cell.

Robertson produced evidence that his father was alcoholic and both physically and emotionally abusive, that he was considered respectful and polite by some, that he had obtained a GED before quitting school, and that his girlfriend considered him a good person. Robertson also presented evidence of his struggle with drugs. At the close of evidence, the jury received the following instruction, among many others:

> You are instructed that you shall consider any evidence, which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence, which in your judgment, has no

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relationship to any of the special issues, but if you find such evidence is mitigating under these instructions, you shall consider the following instructions of the court. You and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the special issues, deserves.

You are instructed that some mitigating evidence, if any, may not be relevant to resolving the special issues but may be relevant in determining whether or not the defendant should be put to death.

In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes" and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

This instruction is referred to by both parties as the "nullification" instruction.

The jury returned affirmative answers to the statutory special issues submitted. In February 1991, the trial court sentenced Robertson to death.

B. On Direct Appeal

On direct appeal, the Texas Court of Criminal Appeals affirmed, and the Supreme Court subsequently denied Robertson's petition for writ of certiorari. *See Robertson v. State*, 871 S.W.2d 701 (Tex.Crim.App.1993), *cert. denied*, 513 U.S. 853, 115 S.Ct. 155, 130 L.Ed.2d 94 (1994).

The Texas Court of Criminal Appeals decision on direct appeal addressed several issues that are germane to the two issues that Robertson seeks a COA for here. Of particular relevance to Robertson's first issue, his argument that he was entitled to a jury instruction on the lesser included offense of murder, Robertson argued that the evidence was insufficient to support his conviction for capital murder because the differentiating capital component, murder in the course of robbery, was not proven. Robertson also argued, as he does now, that the trial court erred by refusing to give a jury charge on the lesser included offense of murder, which he claims was supported by the evidence because the jury could have reasonably rejected the state's evidence that Robertson killed Brau in the course of a robbery. Robertson argued that a non-capital conviction was possible because the jury could have believed that he did not form the intent to rob Brau until after he shot and killed her, which Robertson claims would have negated the element required to define his offense as a capital crime.

The Texas Court of Criminal Appeals rejected Robertson's arguments, holding that the government's evidence was sufficient to prove beyond a reasonable doubt that Robertson committed Brau's murder in the course of committing a robbery, as that element is defined by Texas law. *See Robertson*, 871 S.W.2d at 705 (holding that the intent to rob must be formed before the murder, but that there is no requirement that the wrongful appropriation take place before the murder). The Court also held that Robertson was not

entitled to an instruction on the lesser included offense of murder, finding as a factual matter that the evidence did not support Robertson's contention that a non-capital conviction was possible. *See id.* at 706.

Of particular relevance to Robertson's second issue, he also raised a number of arguments on direct appeal relating to the trial court's punishment phase instructions to the jury. Robertson argued that the trial court erred by submitting the lengthy instruction on the effect of mitigating evidence and that the trial court should have given a separate special issue permitting the jury to express its view of the role played by the mitigating evidence presented. Robertson also made other, related claims that, in sum, amounted to an allegation that the jury was not given an adequate vehicle for guiding its discretion to give weight to mitigating evidence.

The Texas Court of Criminal Appeals likewise rejected these arguments. The Court considered Robertson's claims in light of existing United States Supreme Court precedent. Specifically, the Court held that the "nullification" charge permitted, and indeed invited, the jury to consider all of the constitutionally relevant evidence, thus avoiding the constitutional infirmities condemned by *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). *See Robertson*, 871 S.W.2d at 710-11.

C. State Habeas Corpus

Three years later, Robertson filed a state petition for habeas corpus relief in the convicting court. The state court held an evidentiary hearing, and then entered eighty-six separate findings of fact and conclusions of law, ultimately recommending that relief be denied.

Of particular relevance to Robertson's first issue, his argument that he was entitled to an instruction on the lesser included offense of murder, the state habeas court relied upon the Supreme Court's decisions in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), which held that a capital jury must be instructed on a lesser included non-capital offense when the jury could rationally find that the capital defendant was guilty of only the lesser included non-capital offense. *See Hopper*, 102 S.Ct. at 2053 ("*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction."). Applying these clearly established legal principles the state habeas court held that the trial court did not err by refusing to give an instruction on the lesser included offense of murder because, as a factual matter, "there was no evidence in the record that if the applicant was guilty, he was guilty only of murder." The state habeas court cited compelling evidence that Robertson formed the intent to murder Brau before he shot her and found, again as a factual matter, that Robertson purposefully entered Mrs. Brau's separate portion of the residence, "encountered Mrs. Brau in her den and killed her in order to facilitate his desire to take her car and any money she had." The state habeas court further noted that "there was no evidence presented at applicant's trial that even suggested any other reason for murdering Mrs. Brau other than to facilitate robbing her." Thus, Robertson's contentions that the jury could have found that he formed the intent to rob Brau after he murdered her was supported only by Robertson's speculation that such could be the case. The state habeas court concluded that Robertson was not entitled to a murder instruction because:

> [I]n order for the jury to have found that the applicant was guilty of only murder, they would

> have had to ignore all of the compelling evidence presented that established that applicant killed Mrs. Brau in order to facilitate his robbery of her and to create another possible motive based on no evidence, and this would not have been a rational finding.

Of particular relevance to Robertson's second issue, the state habeas court held that the instructions given in Robertson's case were adequate to satisfy the constitutional demands of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), and related cases. The state habeas court correctly noted that *Penry* did not mandate that any particular vehicle be used to guide the jury's discretion to consider mitigating evidence in a capital case. Thus, *Penry* does not support Robertson's contention that he was entitled to submission of a third special issue specific to the issue of mitigating evidence. The state habeas court then relied upon a host of post-*Penry* Texas cases holding that jury instructions like the ones given in Robertson's case provide a constitutionally adequate vehicle for guiding the jury's discretion as required by *Penry*. *See Patrick v. State*, 906 S.W.2d 481, 493-94 (Tex. Crim. App. 1995); *Heiselbetz v. State*, 906 S.W.2d 500, 503 (Tex.Crim.App.1995); *Riddle v. State*, 888 S.W.2d 1, 7-8 (Tex.Crim.App. 1994); *Garcia v. State*, 887 S.W.2d 846, 860 (Tex.Crim.App.1994); *Fuller v. State*, 829 S.W.2d 191 (Tex.Crim.App.1992). The state habeas court concluded that the jury instructions given in Robertson's case provided a constitutionally adequate vehicle for guiding the jury's discretion to consider mitigating evidence.

In November 1998, the Texas Court of Criminal Appeals relied upon the trial court's findings and conclusions to deny relief.

D. Federal Habeas Corpus

In November 1998, Robertson filed the instant federal petition for relief pursuant to 28 U.S.C. § 2254. Robertson once again alleged constitutional error arising, inter alia, from: (1) the trial court's refusal to give the jury an instruction on the lesser included offense of murder, and (2) the trial court's submission of a "nullification" instruction and refusal to create a third special issue on the effect of mitigating evidence. Given the date of Robertson's filing, his claims are governed by AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997).

In March 2000, a federal Magistrate Judge entered a recommendation that Robertson's petition be denied and dismissed. With regard to Robertson's first issue, the Magistrate Judge summarily concluded that Robertson could not overcome the force of the state courts' factual determinations that the evidence did not support a murder instruction. *See* 28 U.S.C. § 2254(d)(2) & (e)(1). With regard to Robertson's second issue, the Magistrate Judge likewise concluded that Robertson could not demonstrate that the decisions of the state courts were contrary to or involved an unreasonable application of clearly established federal law, as decided by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

In March 2000, the federal district court adopted the Magistrate Judge's recommendation and dismissed Robertson's § 2254 petition. Robertson filed a timely notice of appeal and a request for COA in the district court. The district court denied COA, and Robertson filed the instant motion with this Court.

III. CONTROLLING STANDARDS

To obtain a COA, Robertson must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Barrientes v. Johnson*, 221 F.3d 741,771 (5th Cir. 2000). To meet this standard, Robertson must demonstrate "'that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Barrientes*, 221 F.3d at 771 (quoting *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000).

"[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Id.* Under that section, we are required to defer to a state habeas court's adjudication of a state prisoner's habeas claims on the merits unless the state habeas court's decision: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or (2) constituted an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

The purpose and intent of § 2254(d) is to restrict the number of cases in which competent adjudications by our state courts are subjected to open-ended and unfettered review by the federal courts. For that reason, a state habeas court's decision will generally not be considered "contrary to" clearly established federal law unless: (1) the court's legal conclusion is in direct opposition to a prior conclusion of the United States Supreme Court on the same legal issue or (2) the court reaches a different result than a prior decision of the United States Supreme Court on a set of materially indistinguishable facts. *See Barrientes*, 221 F.3d at 772. Similarly, a state habeas court's decision will

not be considered an "unreasonable application" of clearly established federal law unless, notwithstanding the fact that the state court has correctly identified the controlling legal principles, the state habeas court applies those principles to the petitioner's case in an unreasonable manner. *Id.*

AEDPA likewise obligates the federal habeas courts to afford the state habeas court's factual determinations substantial deference. Indeed, we must presume that the state habeas court's factual determinations are correct, unless rebutted with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Robertson has not, in this case, satisfied AEDPA's rigorous standard for establishing error in the legal conclusions or factual determinations made by the state habeas court when adjudicating his claims. With respect to Robertson's first issue, his argument that due process required that his jury be given an instruction on the lesser included offense of murder, the state habeas court's legal analysis was appropriately premised upon the Supreme Court's decision in *Beck*. Robertson does not identify any other Supreme Court authority capable of calling the state habeas court's reliance upon that case or its application of that case unreasonable. Rather, Robertson's essential point is that the jury could have acquitted on the capital murder charge and convicted on a murder instruction because the jury could have rationally found that he did not form the intent to rob Mrs. Brau until after the offense was completed. We take his point to be primarily a challenge to the state habeas court's factual and record-based findings: (1) that there was ample record evidence to establish that Robertson formed the intent to rob Mrs. Brau before he killed her, and (2) that there was absolutely no record evidence to support Robertson's speculative contention that he *could* have formed the intent to rob Mrs. Brau after he shot her.

Having reviewed the record in light of Robertson's claim, we find no basis for finding that the state habeas court's factual determinations in this regard are either unreasonable or rebutted by clear and convincing evidence to the contrary. Robertson has not identified any actual record evidence, let alone clear and convincing evidence, that the factual conclusions of those courts were in error. Robertson's claims to the contrary are nothing more than supposition, which do not deserve encouragement and could not have served as the foundation of a rational jury finding. We therefore deny Robertson's motion for COA as to his argument that the trial court's refusal to give a murder instruction violated his constitutional rights.

With respect to Robertson's second issue, his argument that the jury instructions failed to provide an adequate vehicle for the consideration of constitutionally relevant mitigating evidence, Robertson's primary argument is that the state habeas court's decision was either contrary to or constituted an unreasonable application of the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

We disagree. Robertson proceeded to trial in August 1990, and he was sentenced to death in February 1991. At that time, the Texas death penalty scheme, codified at Texas Code of Criminal Procedure article 37.071, required affirmative answers to two special issues: one on deliberateness and one on future dangerousness. The statute further required an instruction on provocation, if warranted by the evidence.

In 1989, the Supreme Court reviewed this same version of the Texas statute in *Penry*. *Penry* held that the statutory issues, standing alone, without further instructions to the jury, did not provide Penry's jurors with an adequate vehicle for rational consideration of constitutionally relevant mitigating evidence of Penry's mental condition. *See Penry*, 109 S.Ct. at

2949-52. The Supreme Court remanded the case for resentencing, requiring that additional instructions be given on the issue of mitigating evidence. The Supreme Court did not, however, direct that any particular scheme be used to permit consideration of mitigating evidence. Moreover, the Supreme Court framed its discussion primarily in terms of additional instructions that might be given to the jury, rather than in terms of an additional special issue. *See id.* at 2952; *see also id.* at 2943-44, 2948, 2949, 2951. Thus, *Penry* left the issue of precisely what instructions were required to permit proper consideration of mitigating evidence to the discretion of Texas trial judges.

When Robertson was tried, Texas courts were approaching the *Penry* issue on a case by case basis, with many employing instructions similar to those used in Robertson's case. *See Goff v. State*, 931 S.W.2d 537, 551, n. 3 (Tex. Crim. App. 1996); Lewis v. State, 911 S.W.2d 1, 6, n.12 (Tex. Crim. App.1995); *Patrick v. State*, 906 S.W.2d 481, 493-94 (Tex.Crim.App.1995); *Heiselbetz v. State*, 906 S.W.2d 500, 503 (Tex.Crim.App. 1995); *Riddle v. State*, 888 S.W.2d 1, 7-8 (Tex.Crim.App. 1994); *Garcia v. State*, 887 S.W.2d 846, 860 (Tex.Crim.App. 1994); *Fuller v. State*, 829 S.W.2d 191 (Tex.Crim.App. 1992). Robertson has not identified any portion of *Penry* or any other then-applicable Supreme Court authority that would render the approach taken by the Texas courts in general or his state habeas court in particular contrary to or an unreasonable application of clearly established federal law. Moreover, this Court has already rejected the argument that the approach taken by the Texas courts constituted an unreasonable application of the Supreme Court's decision in *Penry*. *See Penry v. Johnson*, 215 F.3d 504, 508-09 (5th Cir.2000), *cert. granted*, __U.S.__, 121 S.Ct.

563,__L.Ed.2d__(2000).[3] We, therefore, deny Robertson's motion for COA as to his argument that the trial court's jury instructions on the issue of mitigating evidence failed to provide an adequate vehicle for the jury's discretion in this capital case.

CONCLUSIONS

For the foregoing reasons, Robertson's motion for a certificate of appealability is DENIED.

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[3] Alternatively, Robertson argues that the instruction given in this case is per se unconstitutional because it is contrary to *Sparf v. United States*, 156 U.S. 51, 15 S.Ct. 273, 39 L.Ed. 343 (1895). We disagree. There is no doubt that an instruction permitting or encouraging the jury to avoid the controlling law would potentially raise serious or even insurmountable concerns. But the jury in this case "was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in *Penry I*." *Penry*, 215 F.3d at 509.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10512

MARK ROBERTSON
Petitioner - Appellant

v.

GARY L JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION
Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:
/s/ Harold R. DeMoss Jr.
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK ROBERTSON	)	
	)	
V.	)	
	)	3-98-CV-2768-G
GARY JOHNSON, DIRECTOR,	)	
TEXAS DEPARTMENT OF	)	
CRIMINAL JUSTICE,	)	
INSTITUTIONAL DIVISION	)	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. §636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for habeas corpus relief filed by a state inmate pursuant to 28 U.S.C. §2254.

Statement of the Case: Upon his plea of not guilty to the offense of capital murder as charged in the indictment returned in Cause No. F-89-85961-NL Robertson was tried by a jury which found him guilty of capital murder. Thereafter in

the punishment phase the jury gave affirmative answers to special issues 1 and 2 as a result of which in accordance with Texas state law he was sentenced to death.

His capital murder conviction was automatically reviewed by the Texas Court of Criminal Appeals in his appeal from his conviction. The court affirmed his conviction on December 8, 1993. *Robertson v. State*, 871 S.W.2d 701 (Tex.Crim.App.1993). Robertson in turn filed a petition for writ of certiorari in the United States Supreme Court which was denied on October 3, 1994. *Robertson v. Texas*, 513 U.S. 853, 115 S.Ct. 155 (1994).

Robertson filed an application for habeas corpus relief in the convicting court on April 14, 1997, pursuant to art. 11.071, Texas Code of Criminal Procedure. The trial court conducted an evidentiary hearing on November 21, 1997, and thereafter filed written findings of fact and conclusions of law, recommending that the relief sought be denied. On November 18, 1998, the Court of Criminal Appeals adopted the trial court's findings of fact and conclusions of law and accordingly denied relief in an unpublished order. The present petition was filed in this court on November 23, 1998. In response to the petition and this court's show cause order Respondent has filed his answer and motion for summary judgment together with copies of Robertson's prior state proceedings. It is not claimed that Robertson has failed to exhaust state remedies and accordingly this petition is before the court for decision on the merits.

Findings and Conclusions: Robertson's petition, being filed in this court on November 23, 1998, is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). As observed by the Fifth Circuit in *McFadden v. Johnson*, 166 F.3d 757, 759 (5th Cir.), *cert. denied*, __U.S.__, 120 S.Ct. 369 (1999), with the passage of the AEDPA "Congress has narrowed [federal courts'] authority in

habeas review of state convictions to asking if the adjudication by the state courts was an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States."[1]

In his first ground for relief Robertson claims that the trial court erred in failing to incorporate in its guilt-innocence charge to the jury the lesser included offense of murder. In support of this claim he cites the Supreme Court's decision in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382 (1980) and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 (1991).[2]

The Supreme Court's decision in *Beck* is inapposite to Petitioner's case both on the facts and the Court's *ratio decidendi*. In *Beck*, the court reviewed an Alabama state statute which prohibited the trial judge in a capital murder case from giving the jury the option of convicting the defendant of a lesser included offense. 447 U.S. at 628 and at n. 3, 100 S.Ct 2385 and at n. 3. In subsequent opinions the Court has further explained the basis for its decision in *Beck*.

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[1] Contemporaneously with the filing of his petition Robertson filed his "Motion Not to Apply the Provisions of the AEDPA" claiming that had the Texas courts appointed him counsel sometime after his conviction became final on October 3, 1994 *and* prior to the filing of his state habeas corpus application on April 9, 1997, he could have exhausted state remedies and filed his federal petition prior to April 24, 1996, the date on which the AEDPA became effective. The United States Supreme Court has unequivocally held that the AEDPA applies to state prisoner petitions filed on or after April 24, 1996. *Lindh v. Murphy*, __U.S.__, 117 S.Ct. 2059, 2058 (1997). Accordingly Robertson's motion is frivolous as a matter of law.

[2] Robertson also cites *Keeble v. United States*, 412 U.S. 208, 93 S.Ct. 1993 (1973). However, *Keeble* does not address constitutional claims, but rather interprets federal statutory provisions, concluding that the statutes at issue authorized charging a federal jury on lesser included federal crimes.

In *Hopper v. Evans*, 456 U.S. 605, 610, 102 S.Ct. 2049, 2052 (1982), the Court observed that: "Our opinion in *Beck* stressed that the jury was faced with a situation in which its *choices were only to convict the defendant and sentence him to death or to find him not guilty*. The jury could not take a third option of finding although the defendant had committed a grave crime, it was not so grave as to warrant capital punishment" (Emphasis added). The Court also reiterated that the giving of a lesser included offense instruction was only required when supported by the evidence. Id. at 612, 102 S.Ct. at 2053. Although the defendant-respondent was prosecuted under the same statute at issue in *Beck*, the Court reinstated his capital murder conviction because there was no evidence to support a lesser included instruction.

In *Schad v. Arizona*, 501 U.S. 624, 647, 111 S.Ct. 2491, 2504 (1991), the Court stated: "Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all."

Texas state law does not suffer from the same potential vice which was present in the Alabama statute. To the contrary, a charge on a lesser included offense must be given if the offense requested to be charged is a lesser included offense, and if there is some evidence in the record that if the defendant is guilty, he is guilty only of the lesser included offense. *Royster v. State*, 622 S.W.2d 442 (Tex.Crim.App.1981) (opinion on rehearing) (plurality opinion), *adopted*, *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex.Crim.App.1985).

In his federal writ Robertson argues that under the evidence presented at trial a jury *could have* concluded that he killed the murder victim, Edna Brau, for reasons other than to

steal her property and that he decided to take her property as an afterthought - only after he had fatally wounded her. See petition at page 8.

This claim was exhausted when it was presented as a point of error in his direct appeal.[3] The Court of Criminal Appeals thoroughly examined the facts adduced at trial and concluded that there was no evidence in the record that would have permitted a jury to rationally find that if Robertson was guilty, he was guilty only of the lesser included offense of murder. See *Robertson v. State*, supra, 871 S.W.2d at 706-707; see also the court's discussion of his closely related insufficiency of the evidence claim. Id. at 704-706.[4]

The Court of Criminal Appeals' determination that Petitioner was not entitled to a lesser included offense charge constitutes a mixed question of law and of fact. Under the AEDPA such a determination is governed by the provisions of 28 U.S.C. §2244(d)(1). E.g. *Bolden v. Warden West Tennessee High Security Facility*, 194 F.3d 579, 583 (5th Cir. 1999). Further, before a disposition of a mixed law and fact issue can be disturbed or disregarded, it must be found that it was "unreasonable"; that is that the state court decision is *so clearly incorrect* that it would not be debatable among reasonable

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[3] Although he re-asserted this claim in his art. 11.071 application, in the trial court's findings the judge essentially reiterated the same facts recited in the Court of Criminal Appeals' decision which affirmed his capital murder conviction. See Application No. 30,077-01. Findings of Fact and Conclusions of Law, page 263, et seq. at pages 288-294, paragraphs 46 through 56. In a word, no new factual information relating to this claim was presented in the course of the evidentiary hearing.

[4] The guilt-innocence portion of the record is wholly devoid of any evidence that Robertson was a sociopath or that he killed Ms. Brau to avoid detection of the murder of her grandson.

jurists. *Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996), *overruled on other grounds, Lindh v. Murphy*. 521 U.S. 320, 117 S.Ct. 2059 (1997). Robertson cannot discharge this heavy burden, and therefore relief on this ground should be denied.[5]

In his second ground for relief Robertson complains of a portion of the court's punishment phase instruction in which the court advised the jury that if for any reason the jury believed from mitigating circumstances Defendant should not be assessed a death sentence it should answer at least one of the special issues "no".[6]

In his direct appeal Petitioner complained of this instruction on slightly different grounds than that asserted in his state habeas application and in the present petition. *Robertson*,

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[5] Robertson's reliance on the Fifth Circuit's decision in *Cordova v. Lynaugh*, 838 F.2d 764, 757 (5th Cir.), *cert.denied*, 486 U.S. 1061 (1988) is misplaced.

First, the facts set out in *Cordova* are markedly different than those presented in the evidence adduced at Petitioner's trial - not the least of which was that the evidence was such that a jury could have found that his accomplice - not Cordova - had committed the robbery which rendered the murder a capital offense.

However, more to the point and dispositive is the fact that under the AEDPA the only federal law which can be applied are the decisions rendered by the United States Supreme Court. §2254(d)(1). *Accord*, See *Muhleisen v. Ieyoub*, 168 F.3d 840, 844 and n. 2, *cert. denied*, __U.S. __, 120 S.Ct. 81, 145 L.Ed.2d 69 (1999). Therefore, even if the decision in *Cordova* would have been binding precedent which required the granting of relief on this ground - a most dubious premise - had the petition been filed prior to April 24, 1996, the AEDPA forecloses its application in this case.

[6] The complete portion of the instructions which are at issue is quoted at pages 9-10 of the Petitioner's brief. See also *Robertson v. State*, supra, 871 S.W.2d at 710.

supra, at 710. He now claims that the nullification instruction violated the Eighth and Fourteenth Amendments because it arbitrarily and capriciously forced the jurors either to give a false answer to a statutory special issue or to disregard mitigating evidence that made a death sentence inappropriate. He cites three Supreme Court decisions in support of this claim, to wit: *Woodson v. North Carolina*, 428 U.S. 280, 293, 302-04, 96 S.Ct. 2978, 2985, 2989-91 (1976);*Roberts v. Louisiana*, 418 U.S. 325, 335, 96 S.Ct. 3001, 3006-07 (1976); and *Sparf v. United States*, 156 U.S. 51, 101, 15 S.Ct. 273, 293 (1895).[7] None of these cases addresses a jury instruction *per se*. *Woodson* addressed the North Carolina capital murder statue, passed after the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972), supra at 286-87, 96 S.Ct. 2982. *Roberts* addressed Louisiana's post-*Furman* death penalty statute, supra at 329-331, 96 S.Ct. 3004-05. Although *Sparf* involved a federal death penalty case, the portion of the opinion cited by Petitioner relates to the function of the court and that of the jury, holding that "it was competent for the court to say to the jury that, on account of the absence of all evidence tending to show that the defendants were guilty of manslaughter, they could not consistently with law, return a verdict of guilty of that crime." 15 S.Ct. at 293. *Accord, Hopper v. Evans*, supra, at 612, 102 S.Ct. at 2053.

It is true that the plurality opinion of the court in *Roberts* noted that the Louisiana statute gave a jury the unfettered discretion - irrespective of the evidence - to return three types of guilty verdicts, 418 U.S. at 329-331, 96 S.Ct. at 3004-05, but the Court did not address the instructions given at Robert's trial. See also *Hopper v. Evans*, supra, at 612, 102 S.Ct. at 2053. Moreover, the Texas death penalty statute is significantly

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[7] For the reasons stated in notes 5 and 6, supra, this court is precluded from considering federal circuit court opinions and/or state court opinions as persuasive or binding authority on this issue.

different in that no such discretion is given to a jury in the guilt-innocence phase to find a defendant guilty of a lesser included crime unless raised by the evidence. The only discretion permitted, *after the defendant had been found guilty of capital murder*, is in the punishment phase when the jury can by its answers to the special issues either assess punishment at death or life imprisonment.

Reliance on these cases is further undermined by the fact that each was a direct appeal from a final state court conviction in which the Supreme Court granted *certiorari*. A §2254 petition in which a state prisoner raises a due process claim predicated on an alleged erroneous instruction is governed by the Supreme Court's decision in *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S.Ct. 1730, 1736 (1977) wherein the Court stated: "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is `whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process', *Cupp v. Naughton*, 414 U.S. 137, 141, 93 S.Ct. 396, 400 (1973), not merely whether `the instruction is undesirable, erroneous, or even "universally condemned"' Id. at 146, 94 S.Ct. at 400."[3]

Robertson has not shown that the Supreme Court has ever held that the complained of instruction was erroneous. Indeed, the only court which appears to have considered the issue has held that it was an appropriate instruction. *Robertson v. State*, *supra*, 871 S.W.2d at 710-11. Notwithstanding Robertson's argument as to the effect that the instruction would

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[3] Petitioner had not identified any Supreme Court case which holds that an "erroneous instruction claim" in a §2254 petition raises an Eighth Amendment issue.

have on a jury, he cannot show any due process violation since the import of the instruction was to give him the benefit of allowing the jury another basis for declining to answer the special issues submitted in the punishment phase in a manner which would result in the imposition of a death sentence.

In his third and final ground for relief Robertson claims that his trial counsel and the prosecutor had an agreement to excuse or strike minority members of the jury venire on account of their race. It is clear that were such an agreement made that such an agreement would violate the constitutional standards imposed in *Batson v. Kentucky*, 476 U.S. 79, 86-89, 106 S.Ct. 1712, 1716-18 (1986), in depriving the minority venire persons of their right to serve on a petit jury in violation of the Fourteenth Amendment.[9]

However, the existence or non-existence of such an agreement is dependent upon factual determinations. In Petitioner's case and after an evidentiary hearing was held, the Texas state courts found that no such agreement occurred. See Application No. 30,077-01, Findings of Fact and Conclusions of Law, page 263, et seq at pages 274-284, paragraphs 20-38. The Texas Court of Criminal Appeals adopted the trial court's findings of fact in its unpublished order dated November 18, 1998.

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[9] However, it is doubtful that such a violation would entitle a defendant, whose counsel participated in such an agreement, to relief pursuant to §2254. See *Mata v. Johnson*, 99 F.3d 1261, 1268-71 (5th Cir. 1996), *vacated in part on rehearing on other grounds,* 105 F.3d 209 (5th Cir. 1997). Further this court could not grant relief on this basis, even if it disagreed with the holding in *Mata*, since the applicable law is that "clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1); See also notes 5 and 6, *supra.* It is undisputed that the Supreme Court has not yet addressed a *Batson* claim where a criminal defendant himself was responsible for the violation.

Under the AEDPA "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. §2254(e)(1). The burden on a petitioner in attacking a state court's findings of fact is no less formidable than that imposed when an insufficiency of the evidence claim is made. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Further a federal court cannot grant habeas corpus relief in the face of such fact findings unless such findings constitute "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding". §2254(d)(2).

Following exhaustion of the avenues available in the direct appeal of his conviction, Robertson filed a state application pursuant to art. 11.071 in the convicting trial court. On November 21, 1997, an evidentiary hearing was held before the Honorable Pat McDowell, the same judge who presided at Petitioner's trial. Five witnesses were called, consisting of the prosecutors at trial and counsel who represented Petitioner at trial.

Judge McDowell in turn filed his findings with respect to this claim as well as the other claims asserted in Robertson's state application. As noted above, the trial court made numerous and detailed findings of fact on this issue. In an attempt to overturn the State court findings, Robertson points to portions of the evidentiary hearing testimony which he claims are inconsistent with other portions of a witness's testimony or which testimony conflicts with the testimony of other witnesses. See Petition at page 20. However, it is clear from a review of the Statement of Facts from the hearing that there was evidentiary support for each fact finding. The fact that the trial judge made credibility choices between conflicting testimony is precisely the type of decision which is within the factfinder's province and authority and cannot be a basis for holding that the State court findings constitute an unreasonable determination of

facts in light of the evidence. Given the presumption of correctness which applies, and the fact that no agreement to violate *Batson* occurred, it is unnecessary to decide what relief Robertson would be entitled to on this ground were the facts as he wishes they were.

RECOMMENDATION:

For the foregoing reasons it is recommended that the petition be denied and dismissed.

A copy of this recommendation shall be transmitted to counsel for the parties.

/s/ Wm. F. Sanderson, Jr.
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK ROBERTSON	)	
	)	
VS.	)	
	)	3-98 CV-2768-G
GARY JOHNSON,	)	
DIRECTOR	)	
Texas Department of	)	
Criminal Justice,	)	
Institutional Division,	)	

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

SIGNED AND ENTERED this 28 day of April, 2000.

/s/ A. Joe Fish
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK ROBERTSON	)	
	)	
VS.	)	
	)	
GARY JOHNSON,	)	3-98-CV-2768-G
DIRECTOR, TEXAS	)	
DEPARTMENT OF	)	
CRIMINAL JUSTICE,	)	
INSTITUTIONAL	)	
DIVISION	)	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that the petition be and it is hereby denied and dismissed.

IT IS FURTHER ORDERED that the clerk shall transmit a true copy of this judgment to counsel for the parties.

SIGNED AND ENTERED this 28 day of April, 2000.

/s/ A. Joe Fish
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 30,077-01

EX PARTE MARK ROBERTSON

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM DALLAS COUNTY

The order was delivered per curiam. Baird and Overstreet, JJ., would file and set on allegation number two.

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, TEX. CODE CRIM. PROC.

In February 1991, Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, TEX. CODE CRIM. PROC. and the trial court, accordingly, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. *Robertson v. State* 871 S.W.2d 701 (Tex. Crim. App. 1993).

In the instant case, Applicant presents various allegations through which he challenges the validity of his conviction and resulting sentence. After a hearing of Applicant's claims, the trial court entered findings of fact and conclusions of law and recommended that relief be denied.

Having reviewed the record, we adopt the trial court's findings of fact and conclusions of law and find that neither the facts nor the law support Applicant's allegations. Accordingly, we order that relief on said grounds be denied.

IT IS SO ORDERED THIS THE 18TH DAY OF NOVEMBER 1998.

PER CURIAM

En banc
Do Not Publish

APPENDIX F

MARK ROBERTSON, Appellant,
v.
The STATE of Texas, Appellee.
No. 71224.
Court of Criminal Appeals of Texas.
Dec. 8, 1993.
Rehearing Overruled March 9, 1994.

OPINION

MALONEY, Judge.

Appellant was found guilty of capital murder committed in the course of a robbery. TEX. PENAL CODE ANN. § 19.03(a)(2) (West 1990). After the jury returned affirmative answers to the special issues, the trial court sentenced appellant to death. TEX.CODE CRIM.PROC.ANN. art. 37.071(b) (West 1990). Appeal to this Court is automatic. TEX.CODE CRIM.PROC.ANN. art. 37.071(h) (West 1990). We will affirm.

I.

Appellant challenges the sufficiency of the evidence in his first point of error. Specifically, he complains the evidence is insufficient to prove the underlying felony component of the capital murder. A review of the facts is necessary.

Several days after the murder at issue in this case, an officer of the Las Vegas, Nevada police department, running a routine license check on a blue Cadillac with Texas plates, was informed that the car was stolen and that the subjects should be considered armed and dangerous. Appellant and another man were observed approaching the car, which was now parked and unoccupied. The two were apprehended as soon as appellant

placed his key in the ignition. Appellant was read his *Miranda*[1] rights, after which he began a series of confessions.

Appellant first informed the two officers who arrested him that they were lucky to have approached the Cadillac so quickly, because he had not had time to retrieve a gun which was under the seat. Appellant then inquired as to where the television cameras were, believing that by now he would be on the television program "America's Most Wanted."

When Las Vegas Police Department Sergeant Mark Medina arrived at the scene, appellant bragged to him that he was famous. Unaware of what appellant was speaking of, Sergeant Medina inquired further. Appellant responded, " I figured I'd be on America's Most Wanted TV show by now." Sergeant Medina asked appellant if he had been read his *Miranda* rights, and if he still wanted to talk. Appellant said yes, and then stated that he was on probation in Dallas for robbery and that he had shot a boy and his grandmother. Appellant informed Sergeant Medina that he had gone to the house of a friend, Sean Hill, who lived with his grandmother, Edna Brau, in Dallas. Hill had previously sold appellant drugs so the two were acquainted. Appellant and Hill ingested some crystal methamphetamine, commonly referred to as "crank," and went outside to fish. While Hill was fishing, appellant shot him in the back of the head with a .38 caliber pistol. He told Sergeant Medina that he went back inside to steal Hill's drugs. Once inside he saw Ms. Brau in the den watching television and shot her in the head.

Appellant similarly confessed orally to two other officers. In each of those confessions, appellant indicated he

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

shot Hill, went back inside the house, shot Ms. Brau, and began searching the house for valuables, drugs, and the title to Ms. Brau's car, the blue Cadillac.

Appellant also signed a written confession stating:

> On Saturday night around 9 PM I decided to walk over to Sean's house on Hathaway where he lived with his grandmother. When I got there, Sean was in his room watching T.V. We sat around watched TV and did some pot and crank. We then decided to go fishing out in the back yard. We were using one stick with a string and a hook. We would trade off, I think we caught some seven catfishes. While we were fishing, I think we were kneeling. I pulled my gun out of my pants and shot Sean once in the head. After I shot him, Sean fell in the water. I then ran in the house through Sean's bedroom and into the bathroom where I splashed some water over my face. I then walked into the den where Mrs. Hill, Sean's grandmother, was watching TV and I shot her once. I unplugged the TV because it was playing and so was the radio in the bedroom. I looked through her bedroom drawers and found her purse on the make-up counter. I saw some costume jewelry but left it alone. I did take a wristwatch which I later threw away in a garbage can but I don't remember where. I then ran into Sean's room and took his crank which was left on the bed. I then drove off in Mrs. Hill's car. I went on home and then went to Showtime on Greenville and Lover's where I wiped it all down and left it there. I then walked back home. Next day while listening to the evening news I heard about

> their bodies being found. I couldn't sleep for the next couple of days so I figured that I would just leave. I walked back to the parking lot at Showtime where I got in the car and decided to drive to Las Vegas where my parents used to bring me. I had left the car in the parking lot. I threw the purse away in a dumpster at the Village Apts. I think that I left on Tuesday sometime around 4 PM. I drove all the way to Albuquerque, N. Mexico where I spent the night and the following day I drove to Vegas. I was staying at the SuLinda Motel in Vegas. I met Nikki two or three days later at the Circus-Circus. I used my roommate's money to get to Vegas. He had some $700.00 in cash in his room. I think that Mrs. Hill's purse had some $37.00 in cash which I took. These past few days I didn't know what to do and when I got arrested I felt relieved for the most part because I didn't have to run anymore.

Appellant challenges the sufficiency of the evidence to prove he formed the intent to rob Ms. Brau during or prior to her murder.[2] This Court has defined "in the course of committing" an offense listed in section 19.03(a)(2), *supra*, as conduct occurring in an attempt to commit, during the

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[2] Specifically, the indictment alleged that appellant:

> on or about the 19th day of August, [1989 in Dallas County,] did then and there . . .knowingly and intentionally cause the death of Edna Brau, an individual, hereinafter called deceased, by shooting said Edna Brau with a firearm and the defendant intentionally did cause the death of the deceased while the said defendant was *in the course of committing or attempting to commit the offense of robbery of the said deceased* . . .

(emphasis added).

commission, or in the immediate flight after the attempt or commission of the offense, *Garrett v. State*, 851 S.W.2d 853, 856 (Tex.Crim.App. 1993); *Riles v. State*, 595 S.W.2d 858, 862 (Tex.Crim.App. 1980). In order for the murder to qualify as capital murder under section 19.03(a)(2) of the Texas Penal Code, the intent to rob must be formed prior to or concurrent with the murder. *Garrett, supra; see White v. State*, 779 S.W.2d 809, 814-15 (Tex.Crim.App. 1989), *cert. denied*, 495 U.S. 962, 110 S.Ct. 2575, 109 L.Ed.2d 757 (1990).

In reviewing the sufficiency of the evidence in a direct or circumstantial evidence case, a reviewing court determines whether, based on the evidence viewed in the light most favorable to the verdict, a rational jury could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Geesa v. State*, 820 S.W.2d 154, 155-61 (Tex.Crim.App. 1991). "If the State introduces evidence from which the jury could rationally conclude that appellant formed the intent to obtain or maintain control of the victim's property either before or during the commission of the murder, then the State `has proven that a murder occurred in the course of robbery, although the element of appropriation occurred after the murder.'" *Zimmerman v. State*, 860 S.W.2d 89, 93 (Tex. Crim. App. 1993) (*quoting Nelson v. State*, 848 S.W.2d 126, 132 (Tex.Crim.App. 1992)). When viewed in the light most favorable to the verdict, the evidence is sufficient to prove appellant murdered Edna Brau in the course of robbing or attempting to rob her.

Appellant places great importance on the fact that in his oral confession to Sergeant Medina he stated that the reason he went back into the house after shooting Hill was to steal Hill's drugs. Initially we note that in all the other confessions no such intent was stated. Additionally, in one of appellant's other confessions, he stated that after shooting Ms. Brau he began

searching the house for jewelry, money, drugs, and the title to the automobile.

Intent may be inferred from the actions or conduct of appellant. *McGee v. State* 774 S.W.2d 229, 234 (Tex.Crim.App. 1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1535, 108 L.Ed.2d 774 (1990). The evidence showed that Hill's living area was separate from Ms. Brau's quarters and could be entered separately from the outside. When appellant arrived he entered the house through Hill's entrance. Had appellant's intent only been to steal Hill's drugs, he could have accomplished that objective without ever entering Ms. Brau's portion of the house. A rational inference could be made that appellant not only intended to steal the drugs, but entered Ms. Brau's portion of the house with the intention of finding the keys and title to the Cadillac as well as other valuable items in the house. This evidence, in addition to the other confessions of appellant, could lead a rational juror to conclude appellant intended to rob Ms. Brau before or when he shot her. *See Upton v. State*, 853 S.W.2d 548 (Tex.Crim.App.1993); *Nelson v. State*, 848 S.W.2d 126 (Tex.Crim.App.1992); *compare Ibanez v. State*, 749 S.W.2d 804 (Tex.Crim.App.1986) (opinion on original submission) (appellant's confession denied "that the murder occurred in order to facilitate the theft."). Appellant's first point of error is overruled.

In his second point of error, appellant claims that he was entitled to an instruction on the lesser included offense of murder. Like the first point of error, appellant contends the evidence of intent to rob the decedent is weak and as such appellant may only be guilty of murder.

A charge on a lesser included offense must be submitted if the offense requested to be charged is a lesser included offense, and if there is some evidence in the record that if the defendant is guilty, he is guilty of only the lesser included

offense. *Royster v. State*, 622 S.W.2d 442 (Tex.Crim.App. 1981) (opinion on reh'g) (plurality opinion), *adopted, Aguilar v. State*, 682 S.W.2d 556, 558 (Tex.Crim.App. 1985); *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex.Crim.App. 1993). As we clarified the test in *Rousseau:*

> First the lesser included offense must be included within the proof necessary to establish the offense charged, and, second, some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense.

855 S.W.2d at 673. The first prong of the test is easily met, that is, intentional murder is a lesser included offense of capital murder. *Ex parte McClelland*, 588 S.W.2d 957, 959 (Tex.Crim.App. 1979). The more difficult question is whether there is some evidence in the record, which if true, would permit a jury rationally to find that the defendant is guilty only of that lesser included offense.

Under the second prong of the test, appellant was entitled to a charge on the lesser included offense if there was some evidence in the record that would permit a jury rationally to find that appellant had not formulated an intent to rob Ms. Brau before or as he killed her.[3] *See White*, 779 S.W.2d at 815 (question in case of capital murder committed in course of robbery is whether jury would be justified in finding that defendant intended to take victim's property "before, or as" he murdered her); *see also Zimmerman*, 860 S.W.2d at 93 (state proves murder in course of robbery where defendant formed intent to obtain or maintain control of the victim's property "either before or during" commission of murder). "Regardless

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[3] We note again that under the indictment the State was required to prove that appellant intended to cause the death of Ms.Brau in the course of committing or attempting to commit robbery of Ms.Brau. Fn 2, *infra.*

of the strength or weakness of the evidence, if any evidence raises the issue that the defendant was guilty only of the lesser offense, then the charge must be given." *Saunders v. State*, 840 S.W.2d 390, 391 (Tex.Crim.App. 1992). If there is some evidence which negates the aggravating element of the greater offense or if the evidence of such aggravating element is so weak that a rational jury might interpret it in such a way as to give it no probative value, then the defendant is entitled to a charge on the lesser included offense.[4]

Appellant points to his statement to Sergeant Medina that he returned to the house after killing Hill with the intention of stealing Hill's drugs, as evidence that he was guilty only of murder.[5] This statement does not amount to evidence that before or as appellant shot Ms. Brau he had no intent to steal anything belonging to Ms. Brau or that he could not have formulated such intent between the time he decided to return to the house and the time he shot her. Appellant's confessions indicated that after shooting Hill, appellant went into Hill's portion of the house first, and then entered Ms. Brau's portion of the house. He shot Ms. Brau and searched her portion of the house, taking some valuables, and looking for the title to the Cadillac. Appellant then returned to Hill's portion of the house, took the drugs, and left the scene in the Cadillac. If appellant's only desire was to steal Hill's drugs he could have fled the property once this was accomplished, without entering the other

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[4] As we have said, there are two ways in which the evidence may show that a defendant is guilty only of the lesser offense. First, there may be evidence which refutes or negates other evidence establishing the greater offense Second, a defendant may be shown to be guilty only of the lesser offense if the evidence is subject to different interpretations. *Saunders*, 840 S.W.2d at 391-92.

[5] The autopsy indicated, contrary to appellant's assertion in his confession, that Hill was not under the influence of any drugs at the time of his death.

portion of the house. Appellant also places considerable importance on the fact that he did not look for or steal any of Ms. Brau's property until after he shot Ms. Brau. However, Ms. Brau was in the first room appellant would have entered once he decided to burglarize her portion of the house.

Appellant's statement that he intended to steal Hill's drugs does not negate the aggravating element in capital murder, that is, that appellant formulated an intent to steal items belonging to Ms. Brau sometime before or as he killed her. Neither can the evidence be interpreted in such a way as to support a finding that appellant did not formulate an intent to steal from Ms. Brau before or as he shot her. In order for a jury to rationally find appellant guilty of intentional murder but not capital murder, they would have to disregard the evidence of such intent—that appellant went back into the house for the purpose o stealing something, that appellant would not have entered Ms. Brau's portion of the house had he not intended to steal something from that portion of the house, and that appellant stole a number of Ms. Brau's valuables after killing her, including the car in which he fled the scene. A rational jury would not disregard such evidence as probative of appellant's intent to steal from Ms. Brau before or as he murdered her. Appellant's second point of error is overruled.

In his third point of error, appellant complains the trial court erred in overruling his objection to an argument by the State during punishment. Addressing appellant's theory that appellant only attempted to steal Hill's drugs, and that he did not intend to rob Ms. Brau, the State argued that under the

definitions of owner and possession contained in the charge, Ms. Brau could be considered the "owner" who had a greater right to possession of the drugs in Hill's portion of the house.[6]

Appellant argues that there was no "nexus" between Ms. Brau and the drugs. Proof of ownership may be made by circumstantial evidence, just as any other issue in a criminal case. *Jordan v. State*, 707 S.W.2d 641, 644 (Tex. Crim. App.1986). Appellant contends the evidence failed to reflect Ms. Brau had title to the illegal contraband, or that she had any right to possession. However, this was to be determined when the jury considered the charge and the definition of "owner" and "possession." The relationship between the deceased and her grandson as well as the ownership of the house at least raises a factual issue for determination by the jury of whether the deceased had a "greater right to possession of the property" than appellant. *See* TEX. PENAL CODE ANN. § 1.07(a)(24). We agree with the State that this was a factual question for the jury and does not rise to the level of a misstatement of the law. Accordingly, appellant's third point of error is overruled.

II.

In his fourth point of error, appellant complains the trial court erred in not allowing the admission of a psychological evaluation report during punishment under Rule 611 of the Texas Rules of Criminal Evidence as well as cross-examination

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[6] The definition of "owner" and "possession" contained in the charge were identical to the definitions in the penal code:

(24) "Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than an actor.

* * * * * * * * * *

(28) "Possession" means actual care, custody, control, or management.

Tex.Penal Code Ann. § 1.07 (West 1990).

of the witness on the document. Rule 611 provides for the admission of writings used to refresh a witness's memory. The Rule states,

> If a witness uses a writing to refresh his memory for the purposes of testifying or before testifying, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto.

TEX.R.CRIM.EVID. 611

During the punishment phase of the trial the State called appellant's juvenile probation officer as a witness. The witness stated that in preparation for testifying he had read the materials in his file which included a psychological evaluation of appellant, prepared by Plano Child Guidance. The witness also indicated that, based upon the report, further counseling was added as a condition of probation:

> PROSECUTOR: Did you refer [appellant] and his parents to the Plano Child Guidance for additional counseling if they desired to do that?

> WITNESS: Yes, I believe it was prior to the hearing, we had a psychological evaluation done on [appellant] and that's why that was added as a term [of probation], that they were to continue with Child Guidance.[7]

During cross-examination appellant attempted to introduce the psychological evaluation report in its entirety under Rule 611.[8]

While 611 is not a *carte blanche* rule allowing admission into evidence of all the documents in an opposing witness's files, the rule does allow for the discovery of the documents used to refresh a witness's memory prior to or during testimony, and admission of portions of the documents which relate to the witness's testimony.

When the writing is used by the witness to refresh his memory, the opposing party upon request can inspect the document and use it for purposes of cross-examination. *Salazar v. State*, 795 S.W.2d 187, 193 (Tex.Crim.App.1990); *White v. State*, 478 S.W.2d 506, 511-12 (Tex.Crim.App.1972) (failure to compel inspection is error). Further, the opposing party can introduce the document, not for the truth of the matter asserted, but for use by the jury in comparing the document to

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[7] There was another reference to appellant's treatment for drug abuse, but the record is unclear whether this treatment had anything to do with Plano Child Guidance.

[8] During direct examination of the probation officer, the trial court denied appellant's motion to admit the report into evidence, as inadmissible hearsay. Appellant provided no exceptions at this time to the hearsay rule. During cross - examination, the witness testified that he had commissioned an evaluation of appellant by Plano Child Guidance, and as a result of that report the judge had made his probation contingent upon appellant attending the clinic as directed. Appellant again sought introduction of the report based this time on Rule 611, as a writing used to refresh the witness's memory.

the witness's testimony. 1 *McCormick on Evidence § 9* (John W. Strong et al., 4th ed. 1992). However, if it is claimed by the party calling the witness that the writing contains matters not related to the subject matter of the testimony, the trial court must review the writing to determine whether it contains unrelated portions. If so, those portions are redacted from the document and preserved for appellate review. *See United States v. Howton*, 688 F.2d 272, 277 (5th Cir. 1982) (trial court denied review of document used to refresh memory under federal rule 612 because it contained sensitive material and after an *in camera* review determined it was not "germane to the matter covered with the witness on direct"); *accord, Young v. State*, 830 S.W.2d 122, 123 (Tex.Crim.App. 1992) (plurality opinion) (where state does not claim records contained "matters not related to the subject matter of the testimony," defendant is entitled to all records used to refresh a witness's testimony); 1 *McCormick on Evidence* § 9 (John W. Strong et al, 4th ed. 1992).

In this instance the report was used by the witness to refresh his memory prior to testifying. The witness testified on direct examination that based upon his recommendation, further counseling was added as a condition of appellant's probation. The witness also testified that he had relied upon the report in making that recommendation. The report "related to" the testimony of the witness.[9] Because neither party claimed the

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[9] Rule 611 is broader than prior common law rules governing admissibility of documents relied upon by witnesses. Previously, the introduction of such documents were governed by the "Gaskin Rule" and the "use before the jury rule." The "Gaskin Rule" only applied where the writings were prepared by the witness. *White v. State*, 478 S.W.2d at 511, n. 8; *Artell v. State*, 372 S.W.2d 944 (Tex.Crim.App. 1963). Additionally, the scope of discovery and introduction of documents under the "Gaskin Rule" was limited to cross-examination and impeachment. *White*, 478 S.W.2d at 512, n. 10. The "use before the jury rule" allowed a defendant "to inspect, upon his timely request, any document, instrument or statement

report contained matters unrelated to the witness's testimony, it was error not to admit into evidence under Rule 611 the entire document. Therefore, we must address whether the error made no contribution to the punishment. TEX.R.APP.P. 81(b)(2).

In assessing the harmfulness of the trial court's error, we analyze the evidentiary value of the document under Rule 611.[10] A document admitted under Rule 611 is not admitted for the truth of the matter asserted, but rather it is admitted for purposes of testing the credibility of the testifying witness. *See* STEVEN GOODE ET AL., TEXAS RULES OF EVIDENCE CIVIL AND CRIMINAL § 612.3 at 459 (West 1988) (writing offered into evidence under Rule 611 is admissible for impeachment purposes and not as substantive evidence). In this instance nothing in the report contradicted the testimony of the witness. The report recommends that appellant receive further psychotherapy and thereby supports the witness's testimony that based thereon he recommended that the court make continued treatment a term of probation.[11] Accordingly, because the

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which had been used by the State before the jury in such a way that its contents become an issue." *White*, 478 S.W.2d at 511; *Sewell v. State*,367 S.W.2d 349, 351 (Tex.Crim.App. 1963). Rule 611 does not contain any such limitation, but simply provides that portions of the document used to refresh a witness's memory which "relate to" the testimony of the witness are admissible.

[10] We merely address the admissibility of the document under Rule 611. Our holding here today should not reflect any decision on the propriety of the trial court's ruling that the document was inadmissible hearsay.

[11] Appellant made no other attempt to question the witness concerning the document other than predicate questions developing the admissibility of the document under Rule 611. If appellant desired the admissibility of the document for other purposes than for impeachment of the witness's statements during direct examination, he has failed to preserve error. TEX.R.APP.P. 52(b).

report had no impeachment value, its exclusion did not contribute to appellant's punishment and was harmless. Appellant's fourth point of error is overruled.

III.

In his fifth point of error, appellant claims the trial court failed to provide a form for the jury to sign if they were unable to answer the special issues. Appellant wanted the jury to be able to answer the special issues "yes", "no", or "we can't decide."[12]

We have addressed similar contentions concerning a trial court's failure to instruct a jury of the effect of their inability to reach a verdict. In *Nobles v. State*, this Court stated:

> It is the role of a juror to simply answer the special issues either "yes" or "no" and nothing else. Conversely, it is not the role of the individual juror to skirt this responsibility by failing to return a vote. The issues are framed in a manner which permits them to be answered either affirmatively or negatively, and it is the purpose of the deliberative process to resolve juror vacillation.

843 S.W.2d 503, 510 (Tex. Crim. App. 1992); *see also Hathorn v. State*, 848 S.W.2d 101, 124-26 (Tex. Crim. App. 1992); *Draughon v. State*, 831 S.W.2d 331, 337-38 (Tex. Crim.App.1992). It is an integral part of the trial process that we put the jury to a difficult but necessary question. Contrary to appellant's contention, the trial court correctly denied his motion presenting the jury with an option which makes that

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[12] Appellant objected specifically "to the failure of the Court on the verdict form to provide a space for the foremen (sic) to sign if the jury is unable to answer a special issue. This is necessary because if the jury cannot unanimously answer Yes or if 10 cannot answer No the Court shall sentence the defendant to life."

decision easier. *See Nobles, supra; Hathorn, supra.* Appellant's fifth point of error is overruled.

IV.

During the punishment phase of the trial, the trial judge instructed the jury concerning mitigating evidence and its effect on the verdict. Appellant's sixth through fourteenth points of error concern mitigating evidence and the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In this cause the jury was charged at punishment:

> You are instructed that you shall consider any evidence, which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to an aspect of the defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence, which in your judgment, has no relationship to any of the special issues, but if you find such evidence is mitigating under these instructions, you shall consider the following instructions of the court. You and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the special issues, deserves.
>
> You are instructed that some mitigating evidence, if any, may not be relevant to resolving the special issues but

> may be relevant in determining whether or not the defendant should be put to death.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

We will initially address appellant's twelfth and thirteenth points of error. In his twelfth point of error, appellant complains the trial court erred in failing to submit a special issue concerning mitigation rather than the "nullification" charge actually given. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e) (effective Sept. 1, 1991). He argues the "nullification" charge did not "fully and fairly present the issue to the jury for resolution." In his thirteenth point of error, appellant complains the judgment of the trial court is unconstitutional because the jury was not given an adequate vehicle to express their personal, moral reasoned response to appellant's culpability as required by *Penry, supra*, and the Eight Amendment of the United States Constitution.

We disagree. In *Fuller v. State*, this Court held that a nullification charge "was adequate to avoid the constitutional infirmity condemned by *Penry* because we do not perceive a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of

constitutionally relevant evidence." 829 S.W.2d 191,209 (Tex. Crim. App. 1992) (*quoting Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). Appellant is not entitled to a separate "special issue." The Supreme Court has not required that a particular vehicle be employed to allow for the jury's consideration of mitigating evidence, only that the jury be provided with a vehicle. A "nullification" charge is sufficient to meet the commands of *Penry*. *Fuller*, *supra*. Appellant's twelfth and thirteenth points of error are overruled.

In his fourteenth point of error, appellant asks this Court to reassess the facial constitutionality of article 37.071 based on the Eighth and Fourteenth Amendments. He specifically asks us to revisit *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), which upheld the facial constitutionality of our statute and overrule our precedents based on this case. We decline to do so. Appellant's fourteenth point of error is overruled.

In his sixth and seventh points of error, appellant complains the trial court erred by not providing counsel with the "nullification" instruction prior to the beginning of voir dire. Appellant contends that because the law on mitigation was in flux and his attorney was unable to know what type of mitigation charge would be given, he was denied effective assistance of counsel.

We note at the outset that appellant did not submit a requested charge at the time of voir dire. Moreover, a trial judge is not required to prepare a preliminary charge prior to voir dire. Because the evidence has not been heard at this point, it is not an abuse of discretion for a trial court to deny a request prior to voir dire, to decide upon the type of charge to be given at punishment. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 ("The judge shall, before argument begins, deliver to the jury, . . .a written charge distinctly setting forth the law applicable to

the case . . .") (West 1990). Here, the trial court informed appellant he was not willing to determine the type of wording of the charge until the conclusion of the evidence, but because he was aware of appellant's concerns, he would allow appellant "a great deal of freedom on voir dire to discuss mitigation." Appellant does not allege that he was prevented from questioning the venire during voir dire concerning mitigation. Accordingly, we cannot conclude the trial court erred in refusing, prior to voir dire, to decide upon the charge to be given at punishment.

As it was not error for the trial court to refuse to give the instruction prior to voir dire, it was not ineffective assistance for trial counsel to proceed to voir dire without knowing the precise instruction that would be given by the court. To show counsel was ineffective, appellant must demonstrate that his trial counsel's performance was deficient because it fell below an objective standard of reasonableness, and that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53 (Tex.Crim.App. 1986). Appellant has not demonstrated that trial counsel's performance was deficient during the voir dire process. Neither the lack of knowledge of the jury charge as it would finally appear nor knowledge of how the law would develop in a certain area constitute a deficiency in a trial counsel's performance. Appellant's trial counsel was knowledgeable concerning *Penry v. Lynaugh*, *supra*, and counsel requested such instruction during punishment. Additionally, there is no showing that counsel was limited in his questioning of the venire concerning mitigation.

Appellant also contends that counsel could not strike veniremembers for cause in the event they could not follow the law on mitigation. While it may be useful for trial counsel to

understand a potential juror's views concerning certain mitigating evidence, nothing in the law *requires* a juror to consider any particular evidence as mitigating. *See* point of error eight, *infra*. Appellant has made no showing that trial counsel's performance was deficient under the first prong of *Strickland, supra*. Appellant's sixth and seventh points of error are overruled..

In his eighth and ninth points of error, appellant complains the trial court erred in failing to instruct that certain evidence is mitigating as a matter of law and for failing to instruct the jury on the weight to be given mitigating factors, respectively.

The constitution requires that a juror must be provided with a vehicle to give his or her reasoned moral response to relevant mitigating evidence. *Johnson v. Texas*, — U.S. —, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993); *Penry*, 492 U.S. at 328, 109 S.Ct. at 2951. Each juror may or may not believe certain evidence is mitigating; however, the constitution only requires that where a juror believes there is relevant mitigating evidence, that jurors must have a vehicle to give his or her reasoned moral response to such evidence.[13] *Johnson, supra; Penry, supra.*

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[13] In *Teague v. State*, we addressed the propriety of a challenge for cause where the veniremember stated he would not consider a defendant's age to be mitigating where the defendant was "legally of age." 864 S.W.2d 505, 513 (Tex.Crim.App. 1993). We stated:

> A trial court abuses its discretion in overruling a challenge for cause to a veniremember who cannot follow the law. *See Trevino v. State*, 815 S.W.2d 592, 614 (Tex.Crim.App. 1991),*rev'd on other grounds*, __ U.S.__, 112 S.Ct. 1547, 118 L.Ed.2d 193 (1992). The law requires a juror at least to consider youth as a mitigating factor in answering the special issues. See *id.* Here, however, [the veniremember] was not informed the law required him to consider youth or age in mitigation of punishment. Therefore, appellant cannot demonstrate [the veniremember] had

As for instructing the jury as to what weight should be given to the evidence, we have held that appellant "is not entitled to jury instructions specifically informing the jury that certain evidence may be considered or how it may be applied." *Lane v. State*, 822 S.W.2d 35, 39 (Tex.Crim.App. 1991) *cert. denied*, __ U.S. __, 112 S.Ct. 1968, 118 L.Ed.2d 568 (1992) (*quoting Lauti v. State*, 810 S.W.2d 176, 178 (Tex. Crim. App. 1989)); *Havard v. State*, 800 S.W.2d 195,206 (Tex. Crim. App.1989); Tex. Code Crim. Proc. Ann. art. 36.14 (the trial court shall deliver to the jury "a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence. . .") (West 1990). Appellant was not entitled to an instruction on what evidence was mitigating or on what weight to give any mitigating evidence presented at trial. His eighth and ninth points of error are overruled.

In his tenth and eleventh points or error, appellant complains the trial court erred in failing to instruct the jury that it need not be unanimous as to any matter of mitigation and that if ten jurors concurred in a belief the defendant should not be sentenced to death then they should answer "no" to one of the special issues. The trial court instructed the jury that:

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a bias against this phase of the law.

Id. While it makes no difference to the propriety of our ruling in *Teague*, we believe our opinion there misstated the applicable law. We do not believe the law *requires* a juror to consider *youth as mitigating*. *See Cuevas v. State*, 742 S.W.2d 331, 345-346 (Tex.Crim.App.), *cert. denied*, 485 U.S. 1015, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1987); *Cordova v. State*, 733 S.W.2d 175, 189 (Tex.Crim.App.), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2915, 101 L.Ed 946 (1987). A juror may consider youth to be either mitigating, or, in some instances, aggravating. *Johnson v. Texas*, __ U.S. __, 113 S.Ct. at 2669-2670; *Graham v. Collins*, 506 U.S. ___, 113 S.Ct. 892, 910, 122 L.Ed.2d 260 (1993). To the extent that our opinion in *Teague* contradicted this, we expressly disavow such language here today.

> You may not answer a special issue "Yes" unless the jury unanimously concurs, and in such event, the verdict form for such special issue shall be signed by your presiding juror. You may not answer a special issue "No" unless 10 or more jurors concur, and in such event, your presiding juror shall sign the verdict form.
>
> You are further instructed that if any juror, after due deliberation and considering all the evidence and the instructions, has a reasonable doubt as to whether the answer to a special issue should be answered "yes" then such juror should vote "no" to that special issue.

The trial court then instructed the jury on the nature and effect of mitigating evidence, *supra*.

Appellant claims the language cited above is applicable to only the special issues and that the charge failed to inform the jury of the effect of ten jurors believing there is sufficient mitigating evidence to warrant a sentence of life. We have previously upheld a trial court's denial of similar instructions. *Rousseau*, 855 S.W.2d at 686-87; *Nobles*, 843 S.W.2d at 508-09; *Draughon*, 831 S.W.2d at 337-38.

The jury was instructed that the verdict form should reflect a "yes" or "no" answer to the special issues, *supra*. Directly following this section, the jury was instructed that if any juror believes there are mitigating circumstances such that the defendant should not be put to death, they are to answer one of the special issues "no." The second section pertains to a juror's individual answers, while the first applies to the answers reflected on the verdict form. Consequently, we believe it was clear that if ten jurors believed there was mitigating evidence and that the defendant deserved a sentence of life rather than death, then the verdict form should reflect a negative answer to

one of the special issues. The only decision remaining for the jury is in deciding which of the two special issues should they cast the negative vote.

Further, while the jury was not informed of the single consequences of a single negative vote, if one juror believed, after consideration of the nullification charge, that the defendant should not be put to death then that juror could then vote no to one of the special issues, and the jury would not be able to answer the special issues. By operation of law, where the jury is unable to reach a verdict during punishment of a capital case, the defendant is sentenced to life. TEX. CODE CRIM. PROC. ANN. art. 37.071(e). Accordingly, appellant's tenth and eleventh points of error are overruled.

V.

In his fifteenth, sixteenth and seventeenth points of error, appellant objects to the trial court's failure to define "beyond a reasonable doubt," "criminal acts of violence," and "probability," respectively. This Court has previously held a trial court does not err in refusing to define the terms "criminal acts of violence" and "probability," *Canty v. State* 842 S.W.2d 667, 691 (Tex.Crim.App. 1992).

At the time of appellant's trial, a trial judge was not required to define or amplify the phrase "beyond a reasonable doubt." *Goss v. State*, 826 S.W.2d 162, 169 (Tex.Crim.App. 1992). However, appellant urges that we reconsider our decision in *Geesa v. State*, in which we provided a definition for "beyond a reasonable doubt," to be applied prospectively. 820 S.W.2d 154, 163-64 (Tex.Crim.App.1991). We decline to revisit the retroactivity decision in *Geesa*. Appellant's fifteenth through seventeenth points of error are overruled.

VI.

In his eighteenth and final point of error, appellant contends the trial court erred by failing to instruct the jury that his oral confession to Sergeant Medina should not be considered by the jury unless they determine that appellant had been properly warned as to his rights under article 38.22, section 2(a)(5) of the Texas Code of Criminal Procedure.[14] *See* TEX.CODE CRIM.PROC.ANN. art. 38.22 § 3(a). There is no contention by appellant that he was not read his *Miranda*[15] warnings. However, the Las Vegas police failed to inform appellant he had the right to terminate the interview at any time, a right not expressly among those required by *Miranda*, *supra*.

The flaw in appellant's argument is his assertion that the oral confession was admitted under article 38.22, section 3(a), rather than under section 3(c). Section 3(a) requires that all warnings set out in section 2 including the right to terminate the interview, be read to a defendant. Section 3(c) provides:

> Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

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[14] Initially we note that article 38.22, section 3(a)(2) requires that prior to any oral confession being admitted in a criminal proceeding, the warnings set out in section 2(a), including sub-section 5, shall be given. Section 2(a)(5) provides that an accused be informed that "he has the right to terminate the interview at any time.

[15] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

TEX.CODE CRIM.PROC.ANN. art. 38.22(3)(c) (West 1990). The only warnings which must precede an oral confession admitted under section 3(c) are the *Miranda* warnings. *Perillo v. State* 758 S.W.2d 567, 575 (Tex.Crim.App. 1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 608 (1989). In this instant, appellant informed Sergeant Medina of the crime, *as well as* the crime weapon and its location. Appellant confessed to the Sergeant that he had used a .38 caliber pistol, that he had stolen the gun from a car parked at a club in Dallas, and that the gun was in a jewelry box on the floorboard in the back seat of the stolen blue Cadillac. Pursuant to appellant's directions, the Nevada police officers located the alleged murder weapon. That weapon was identified by Texas forensic authorities as the murder weapon. Because the confession contains assertions of facts which were found to be true and which help establish appellant's guilt, the confession was admissible under article 38.22, section 3(c) of the Texas Code of Criminal Procedure. Appellant's eighteenth and final point of error is overruled.

The judgment of the trial court is affirmed.

CLINTON, J., dissents.

Supreme Court, U.S.
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No. 00-1479

In the
Supreme Court of the United States

MARK ROBERTSON,
Petitioner

VS.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **WHETHER ROBERTSON WAS ENTITLED TO A JURY INSTRUCTION ON A LESSER INCLUDED OFFENSE OF MURDER WHERE THERE WAS NO EVIDENCE TO SUPPORT THE INSTRUCTION.**

2. **WHETHER ROBERTSON PRESENTED CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE, AND, IF SO, WHETHER THAT EVIDENCE WAS WITHIN THE JURY'S EFFECTIVE REACH UNDER THE INSTRUCTIONS SUBMITTED AT THE PUNISHMENT PHASE OF TRIAL.**

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No. 00-1479

In the
Supreme Court of the United States

MARK ROBERTSON,
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VS.

GARY L. JOHNSON, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), respondent[1] herein, by and through the Attorney General of Texas, and files this brief in opposition.

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[1] The petitioner is referred to as "Robertson" and the respondent is referred to as "the Director."

OPINION BELOW

A copy of the published opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability ("COA"), *Robertson v. Johnson,* 234 F.3d 890 (5th Cir. 2000), is attached to Robertson's petition for writ of certiorari as Appendix A.

JURISDICTION

Robertson seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Robertson bases his complaints on the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Robertson is confined pursuant to a judgment and sentence of the Criminal District Court No. 5 of Dallas County, Texas, Cause No. F89-85961-NL, styled *The State of Texas vs. Mark Robertson.* Robertson was indicted on September 18, 1989, for the capital offense of the intentional murder of Edna Brau while in the course of committing and attempting to commit the offense of robbery of Brau on or about August 19, 1989. Tr 3.[2] The case against Robertson was heard by a jury, which found him guilty of capital murder on January 29, 1991. Tr 311. Following a separate punishment hearing, the jury answered affirmatively special issues number one and two, submitted pursuant to former TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1988).[3] Tr 317-18. In accordance with Texas law, the trial court

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[2] "Tr" refers to the direct appeal transcript, and "SR" refers to the direct appeal record.

[3] At the time of Robertson's trial, the sentence in a Texas capital murder case was based upon the jury's answers to the following special issues:

sentenced Robertson to death. Tr 321-23. Robertson directly appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on December 8, 1993. *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993). The Court of Criminal Appeals denied Robertson's motion for rehearing on March 9, 1994. Robertson next filed a petition for a writ of certiorari, which was denied by this Court on October 3, 1994. *Robertson v. Texas*, 513 U.S. 853 (1994).[4]

Robertson filed an application for writ of habeas corpus in state court on April 14, 1997, again raising the *Beck* and *Penry* claims. An evidentiary hearing was held on November 21, 1997. The trial court entered findings of fact and conclusions of law recommending that relief be denied on June 26, 1998. The Court of Criminal Appeals adopted the trial court's findings of fact and conclusions of law, and found that neither the facts nor the law supported Robertson's allegations. Accordingly, the court denied relief on November 18, 1998.

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(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Because there was no evidence of provocation in the instant case, only the first two issues were presented to the jury. The jury was also given a supplemental instruction, directing the jury in part as follows: "In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are 'Yes,' and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues 'No' in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you."

[4] Robertson raised, as he had on direct appeal, the *Beck v. Alabama*, 447 U.S. 625(1980), and *Penry v. Lynaugh*, 492 U.S. 302 (1989) claims raised here.

Ex parte Robertson, No. 30,077-01 (Tex. Crim. App. November 18, 1998).

Robertson's application for a federal writ of habeas corpus was filed on November 23, 1998, in the United States District Court for the Northern District of Texas. Robertson alleged, again, constitutional error arising from: (1) the trial court's refusal to give the jury an instruction on the lesser included offense of murder, and (2) the trial court's submission of a supplemental instruction and refusal to create a third special issue on the effect of mitigating evidence. The district court entered final judgment denying relief on April 28, 2000. Robertson timely filed notice of appeal and applied for COA on May 5, 2000. The district court denied COA on May 15, 2000. On June 26, 2000, Robertson filed a motion for COA in the Fifth Circuit. On December 4, 2000, the Fifth Circuit denied COA. Robertson then filed a petition for rehearing which was denied on January 3, 2001. Robertson's instant petition followed.

B. Statement of Facts

1. Guilt-innocence Phase

The background of the case was accurately set out by the Fifth Circuit in opinion denying COA:

> Edna Brau and her grandson, 19-year-old Sean Hill, were last seen alive on August 19, 1989, at Brau's Dallas, Texas home where both Brau and Hill lived. Hill's accommodations were in a separate wing of the house, with its own bath and an outside door providing independent access to the home. On the afternoon of August 20, 1989, Brau's daughter and son-in-law came to Brau's home and found her dead on the den sofa. Police later determined that Brau was shot once in the face. Hill was found dead in a pond behind the house. Hill was shot once in the back of the head. Brau's belongings in her portion of the residence, including the den, master bedroom, master bedroom dressing area, kitchen, and dining room were in disarray, as

though someone had rummaged through the house. Brau's purse, her car keys, the papers on her car, and her blue Cadillac were all missing, together with other personal belongings.

* * *

Eight days later, a Las Vegas police officer observed Robertson, accompanied by a male passenger, driving the stolen Cadillac on the Las Vegas strip. A NCIC computer check confirmed that the car was stolen and that the occupants might be armed and dangerous. Las Vegas police continued observing the car after it was parked in the parking lot of the Circus Circus casino. When Robertson and the passenger returned to the car, the police moved in to apprehend both men. The gun used to murder Brau and Hill was found in Brau's Cadillac.

At the arrest scene, Robertson informed police that they were lucky to have approached quickly, before he could retrieve the gun hidden under the seat. Robertson asked police where the television cameras were and whether he was on America's Most Wanted. When Las Vegas Sergeant Mark Medina inquired what he meant, Robertson confessed to Medina that he was on probation for robbery in Dallas and, further, that he had shot Edna Brau and her grandson Sean Hill in Dallas. Robertson told Sergeant Medina that he went to the house to see Hill, who had been a friend and drug supplier of Robertson's. Robertson claimed that he and Hill used some crank (crystal methamphetamine), and then went outside to go fishing.[5] Robertson told Sergeant Medina that while Hill was fishing, he shot Hill once in the back of the head with a .38 caliber firearm. Robertson told Medina that he wanted to

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[5] Contrary to Robertson's oral confession, the autopsy performed on Hill indicated that there were no drugs in Hill's body at the time of his death.

steal Hill's drugs. Robertson also told Medina that he went into Brau's portion of the home because he wanted to find money, jewelry, and the title to Brau's car, which he planned to sell later. Robertson shot Brau once in the head when he discovered her watching television on the couch in her den.[6]

Robertson also signed a written confession, in which he states:

> On Saturday night around 9 PM I decided to walk over to Sean's house on Hathaway where he lived with his grandmother. When I got there, Sean was in his room watching T.V. We sat around watched TV and did some pot and crank. We then decided to go fishing out in the backyard. We were using one stick with a string and a hook. We would trade off, I think we caught some seven catfishes. While we were fishing, I think we were kneeling. I pulled my gun out of my pants and shot Sean once in the head. After I shot him, Sean fell in the water. I then ran in the house through Sean's bedroom and into the bathroom where I splashed some water over my face. I then walked into the den where Mrs. Hill, Sean's grandmother, was watching TV and I shot her once. I unplugged the TV because it was playing and so was the radio in the bedroom. I looked through her bedroom drawers and found her purse on the make-up counter. I saw some costume jewelry but left it alone. I

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[6] Robertson later made consistent oral confessions to other officers.

did take a wristwatch which I later threw away in a garbage can but I don't remember where. I then ran into Sean's room and took his crank which was left on the bed. I then drove off in Mrs. Hill's car. I went on home and then went to Showtime on Greenville and Lover's where I wiped it all down and left it there. I then walked back home. Next day while listening to the evening news I heard about their bodies being found. I couldn't sleep for the next couple of days so I figured that I would just leave. I walked back to the parking lot at Showtime where I got in the car and decided to drive to Las Vegas where my parents used to bring me. I had left the car in the parking lot. I threw the purse away in a dumpster at the Village Apts. I think that I left on Tuesday sometime around 4 PM. I drove all the way to Albuquerque, N. Mexico where I spent the night and the following day I drove to Vegas. I was staying at the SuLinda Motel in Vegas. I met Nikki two or three days later at the Circus-Circus. I used my roommate's money to get to Vegas. He had some $700.00 in cash in his room. I think that Mrs. Hill's purse had some $37.00 in cash which I took. These past few days I didn't know what to do and when I got arrested I felt relieved for the most part because I didn't have to run anymore.

234 F.3d at 892-93.

2. *Punishment Phase*

The punishment case was also accurately summarized by the Fifth Circuit in its opinion denying COA:

> During the punishment phase, the state presented evidence, inter alia, relating to Robertson's past criminal behavior, which included serious vandalism at about age 12, suspension for taking a loaded handgun to school at about age 13, car theft and destruction of property at about age 14, marijuana possession at about age 15, and a second marijuana possession resulting in conviction at about age 18, an aggravated robbery conviction involving a baseball bat and knife at about age 18, and thirteen cases of issuing bad checks at about age 19, after which he violated the terms of his probation on the aggravated robbery charge and the bad check charge by failing to report, failing to pursue drug counseling, and failing to perform community service. The state also presented extensive evidence relating to Robertson's murder of the 19-year-old convenience store clerk only ten days before he killed Brau and Hill. Finally, the state produced records of Robertson's bad prison behavior since incarceration on the charge, including evidence of an escape attempt and a fire he set in his cell.
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> Robertson produced evidence that his father was alcoholic and both physically and emotionally abusive, that he was considered respectful and polite by some, that he had obtained a GED before quitting school, and that his girlfriend considered him a good person. Robertson also presented evidence of his struggle with drugs.

Id. at 894.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. As an initial matter, Robertson filed his federal habeas petition on March 6, 1998, well after enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). *(Michael) Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Under the amended provisions of Section 2254(d), a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of law and fact. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). This Court's decision in *(Terry) Williams* makes clear that a federal court's discretion to grant a writ of habeas corpus is limited and the court may only issue a writ if the state court's decision was "contrary to" or "involved an unreasonable application of" established federal law. 529 U.S. at 412-13.

Under the "unreasonable application" clause, the court may grant the writ if the state court identifies the correct governing legal

principle but applies it incorrectly, or extends or refuses to extend a legal principle to an area outside the scope intended by this Court. *Id.* at 408, 413. Furthermore, the state court's application of the law must be "unreasonable" in addition to being merely "incorrect." *Id.* at 411. This Court explained, "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

Under the "contrary to" clause of section 2254(d)(1), a federal court may grant the writ if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Id.* at 412-13. Here, for the reasons discussed below, and in light of the AEDPA standard of review, Robertson fails to advance a compelling reason for this Court to review his case, and none exists. Accordingly, this Court should decline to exercise its certiorari jurisdiction to review Robertson's claims.

II.

THE FIFTH CIRCUIT PROPERLY HELD THAT THE STATE COURT REASONABLY APPLIED *BECK V. ALABAMA* IN UPHOLDING THE DENIAL OF A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF MURDER.

Robertson claims he was entitled to a lesser included instruction on murder under *Keeble v. United States*, 412 U.S. 205 (1973), and *Beck v. Alabama*, 447 U.S. 625 (1980), because the evidence at trial raised competing inferences as to whether he formed the intent to rob Brau before or after he murdered her. However, this claim does not warrant certiorari review because the lower court, as well as the state court, reasonably found that no constitutional violation occurred because there was no evidentiary basis for instructing the jury on a lesser included offense.

In *Beck* this Court held that the death penalty could not be imposed "after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of a lesser included non-capital

offense, and when the evidence would have supported such a verdict." 447 U.S. at 627. *Accord Hopper v. Evans*, 456 U.S. 605, 609 (1982). This principle was not violated by failing to give a lesser-included instruction in Robertson's case.

In *Beck*, this Court invalidated, on the basis of the Eighth and Fourteenth Amendments, Alabama's blanket statutory prohibition against giving lesser-included offense instructions in capital cases. Alabama's death penalty scheme provided juries in capital cases with only two options: find the defendant at once guilty of capital murder and sentence him to death or acquit him.[7] *Id.* at 645. The *Beck* Court's holding stemmed from its recognition that the all-or-nothing choice between death and total acquittal could lead juries to act unlawfully: convicting of capital murder and imposing the death penalty because the defendant was guilty of a serious, violent crime, although there was reasonable doubt as to this guilt of the capital offense; or acquitting, although the defendant was plainly guilty of the capital crime, because of a belief that he did not deserve to die. *Id.* at 642-43; *Hopper v. Evans*, 456 U.S. at 609. The *Beck* Court, thus, "was concerned with insuring that *sentencing discretion* in capital cases is channeled so that arbitrary and capricious results are avoided," and the Court's holding was limited to the facts of that case. *Hopper*, 456 U.S. at 611 (emphasis added).

Robertson fails to take into account the critical differences that exist between the relevant Texas and Alabama death penalty statutes. The Alabama sentencing scheme under consideration in *Beck* was a unitary one in which, if the jury found the defendant guilty of the capital crime, it was *required* to impose the death penalty. *Id.* at 609. The Texas statute, by contrast, provides for a bifurcated procedure in a capital case, pursuant to which the jury first must find the defendant

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[7] Under the Alabama sentencing scheme at issue in *Beck*, the jury had the ultimate sentencing power, and after a jury found a defendant guilty and fixed punishment at death as required by law, it was incumbent upon the trial judge to conduct a hearing on punishment. However, the *Beck* Court found that the state's statistics showed that the jury's verdict would ordinarily be followed by the trial judge even though he must hold a separate hearing on punishment and, thus, was "not persuaded that sentencing by the judge compensate[d] for the risk that the jury would return an improper verdict because of the unavailability of a "third option."

guilty of the capital offense. The mere factual finding of guilt does not result in a death sentence. Only after this finding of factual guilt, and after a separate evidentiary proceeding, does the jury consider whether the defendant should be sentenced to death or life imprisonment. TEX. CODE CRIM. PROC. ANN. art. 37.071. Thus, unlike the situation presented in *Beck*, the failure to give a lesser-included offense instruction does not result in the capital jury's being forced to choose between setting the defendant free or convicting him of the capital crime and sentencing him to death. *Beck* does not require that the jury be given the option of convicting a capital defendant of a lesser-included offense when the capital sentencing scheme does not pose the potential for unreliable sentencing inherent in the Alabama scheme. *See Hopkins v. Reeves*, 524 U.S. 88 (1998). The central concern of *Beck* consequently is not implicated in this case, because Robertson's jury was not presented with an all-or-nothing decision. *See Schad v. Arizona*, 501 U.S. 624 (1991).

Although *Beck* itself spoke only to a statute under which the judge could not give the requested instruction, the rationale of *Beck* has nonetheless been held by lower federal courts to apply equally to cases in which a trial judge refuses to give an instruction that is available under state law. *Lincecum v. Collins*, 958 F.2d 1271, 1275 (5th Cir.), *cert. denied*, 506 U.S. 957 (1992), *citing Cordova v. Lynaugh*, 838 F.2d 764, 767 & n. 2 (5th Cir.), *cert. denied*, 486 U.S. 1061 (1988); *Reddix v. Thigpen*, 805 F.2d 506, 511-12 (5th Cir. 1986). To be entitled to an instruction on a lesser-included offense, a capital defendant must demonstrate that a "rational juror, given all the facts, [could acquit him] of capital murder and [convict] him of [the] lesser included offense." *Andrews v. Collins*, 21 F.3d 612, 629 (5th Cir. 1994)(citing *Cordova v. Lynaugh*, 838 F.2d at 767), *cert. denied*, 513 U.S. 114 (1995). "This necessarily requires a showing that the facts of the case and the laws of the State warrant such an instruction." *Hill v. Black*, 920 F.2d 249, 252 (5th Cir. 1990), *modified*, 932 F.2d 369 (5th Cir. 1991). Under Texas law, a lesser-included offense instruction must be given if there is "some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense." *Godsey v. State*, 719 S.W.2d 578, 584 (Tex.Crim.App. 1986).

Where, as here, a state court examines the evidence and determines that the jury could not rationally convict the defendant of the lesser-included offense, the state court's conclusion forecloses relief. *Hill v. Black*, 920 F.2d at 251.

In Robertson's case, the aggravating element of robbery distinguished his capital offense from simple murder. *See* TEX. PENAL CODE § 19.03(a)(2). Robertson asserts that the jury could have concluded that he killed Brau because he was sociopathic, high on drugs, or wanted to eliminate Brau as a potential witness to the murder of Hill, and that he thereafter decided to steal Brau's property. But the evidence does not support an instruction on the lesser included offense of murder.

Robertson confessed that he had a serious drug problem, that he had previously purchased drugs from Hill, and that after he killed Hill, he went back to the house to steal Hill's drugs. 58 SR 156; 59 SR 23, 26, 56. He also stated that after shooting Brau, he began looking for Hill's drugs, any money or jewelry, and the title to Brau's car. 58 SR 156; 59 SR 28. In addition to taking the drugs from Hill's bed after killing Brau, Robertson took $30 in cash, Brau's wristwatch and purse, the title to Brau's Cadillac, and the Cadillac itself. 59 SR 29, 56. This evidence was not rebutted, as Robertson chose not to present any evidence on his own behalf during the guilt-innocence phase of the trial. *See* 59 SR 116. As owner of the house, Brau was also the owner, as defined in the charge, of any property in the house, as she clearly had a right superior to Robertson to any such property.[8] Therefore, Robertson's stated intent to steal drugs belonging to Hill prior to killing Brau satisfies the "in the course of committing a robbery" element of

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[8] The court's charge at the guilt-innocence phase of Robertson's trial defined "owner"as follows: "Owner means a person who has title to the property, possession of the property, *or a greater right to possession* of the property than the actor." Tr 305 (emphasis supplied). *See* TEX. PENAL CODE § 1.07(a)(35)(A). Under Texas law, proof of ownership may be made by circumstantial evidence, and strong circumstantial evidence of ownership (the relationship between Brau and Hill, and the fact that it was Brau's house) existed in this case. *See Robertson*, 871 S.W.2d at 707.

Robertson's capital murder charge.[9]

Moreover, there is no evidence that the taking of Brau's money, jewelry, and car was an afterthought. On the contrary, Robertson's express purpose for re-entering the house was to steal. 59 SR 26. Robertson entered Hill's room through his separate outside entrance and splashed water on his face. 59 SR 55-57. However, before taking the drugs that were lying on Hill's bed and leaving, he entered the separate portion of the house in which Brau lived and killed her, and then began ransacking the house in search of money, jewelry, and the title and keys to Brau's Cadillac. Given the foregoing, a jury could not have rationally acquitted Robertson of capital murder and found him guilty of the lesser offense of murder. Robertson presents no evidence that he may have killed Brau because he was a sociopath, was high on drugs, or because he did not want her to be a potential witness to Hill's murder. Accordingly, there was no error in failing to instruct the jury on the offense of murder in Robertson's case. *See Hopper v. Evans*, 456 U.S. 605.

On state habeas review, the trial court made detailed findings and concluded that the evidence did not support the instruction on murder. The state court found that there was ample record evidence to establish that Robertson formed the intent to rob Mrs. Brau before he killed her, and that there was absolutely no record evidence to support Robertson's speculative contention that he could have formed the intent to rob Mrs. Brau after he shot her. Upon reviewing the record, the Fifth Circuit found that there was no basis for finding that the state habeas court's factual determinations were either unreasonable or were rebutted by clear and convincing evidence to the contrary.[10] Because the denial

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[9] Under Texas law, the intent to rob must be formed before the murder, but there is no requirement that the wrongful appropriation take place before the murder. *See Robertson*, 871 S.W.2d at 705.

[10] Robertson additionally asserts that the Fifth Circuit erred to the extent that it required him to cite Supreme Court authority to demonstrate that the state habeas court's application of *Beck* was unreasonable, and maintains that the application of *Beck* was unreasonable under *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir.), *cert. denied*, 486 U.S. 1061 (1988). The Fifth Circuit, in noting that Robertson did not identify any Supreme Court authority capable of calling the state habeas court's reliance upon *Beck* unreasonable, was referencing the applicable standard of review, which requires Robertson to show that the state court decision either (1) resulted in a decision

of relief by the state courts was reasonable and not contrary to clearly established Supreme Court precedent under the AEDPA, federal habeas relief was appropriately denied.

III.

THE FIFTH CIRCUIT PROPERLY HELD THAT THE STATE COURT REASONABLY APPLIED *PENRY* IN UPHOLDING THE PUNISHMENT PHASE INSTRUCTIONS.

Robertson argues that a supplemental instruction submitted at the punishment phase of his trial was an unconstitutional "nullification" instruction under *Sparf v. United States*, 156 U.S. 51 (1895) and *Roberts v. Louisiana*, 428 U.S. 325 (1976). He complains therefore that the charge failed to provide a vehicle for consideration of evidence "that he had been terrorized during his early childhood by an abusive, alcoholic father, had a significant drug problem, and was generally polite and respectful." However, the evidence Robertson points to was not constitutionally relevant mitigating evidence, and even if it were, was not beyond the scope of the two special issues given. Therefore any infirmity in the supplemental instruction has no Eighth Amendment implications. In any event, even if the evidence were constitutionally relevant *and* beyond the scope of the two special issues, the supplemental instruction – itself not an unconstitutional "nullification"

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that was contrary to, or involved an unreasonable application of, clearly established federal law, *as determined by the Supreme Court of the United States*; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). The Fifth Circuit did not *require* Robertson to cite Supreme Court authority to demonstrate that the state habeas court's application of *Beck* was unreasonable. Rather, the Fifth Circuit put Robertson to his task of showing that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Robertson*, 234 F.3d at 898. Whether or not Robertson was entitled to a lesser included instruction on murder is a fact based question, determinable from the record, and the facts in this case do not compare to those in *Cordova*. In that case, in the face of evidence that *Cordova did not personally participate in the robbery of Hernandez and no stolen property was traced to Cordova*, the Fifth Circuit found that a rational jury could have concluded that Cordova had no "prior agreement or common purpose" to rob Hernandez, and could then have acquitted Cordova of capital murder, and found him guilty of murder. *Cordova*, 838 F.2d at 768-69.

instruction – provided the jury with an adequate vehicle to consider the evidence.

A. The evidence was not constitutionally relevant mitigating evidence.

A capital defendant is entitled to an individualized sentencing decision that is a reasoned moral response to the evidence, including mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). The precise rule that *Penry* established is that when mitigating evidence is presented that the jury cannot fully consider and give effect to when answering the special issues, "Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed . . ." *Id.* at 318-19. This was done in Robertson's case.

As this Court recognized in *Skipper v. South Carolina*, however, not everything that a defendant introduces in mitigation of punishment is "relevant mitigating evidence." *Skipper*, 476 U.S. 1, 7 n.2 (1986). Evidence of a defendant's character or background attains constitutionally mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character or background proffered in mitigation of punishment:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (emphasis in original)); *see also Penry*, 492 U.S. at 319. Unless the

defendant can demonstrate some connection between his crime and his proffered evidence, he does not show that his culpability is reduced. *See Madden v. Collins*, 18 F.3d 304, 307 (5th Cir. 1994), *cert. denied*, 513 U.S. 1156 (1995) (finding that in contrast to Madden's case, in Penry "there was a clear nexus between Penry's handicap and his criminal act"). Without a nexus between the crime and the defendant's proffered mitigating evidence, such evidence can only provide a basis for the jury to exercise sympathy for the defendant, and a decision based only on sympathy cannot be a reasoned moral response to the defendant's culpability. *See Saffle v. Parks*, 494 U.S. 484, 492-93 (1990). Robertson's evidence of childhood abuse, without more, is not relevant to his culpability for his crime. Moreover, as Robertson also fails to demonstrate a nexus between the abuse and the crime, the evidence would also not have any bearing on his potential, or lack thereof, to commit acts of criminal violence in the future. The evidence of childhood abuse thus only provides a basis for the jury to exercise sympathy or mercy, to which Robertson is not constitutionally entitled. *Id.* at 492-93.

Similarly, Robertson does not demonstrate a nexus between his drug use and the murder of Brau that would reduce his culpability. His confessions demonstrate not that he killed Brau because he was high and irrational, or even that he was acting under the duress of an uncontrollable addiction; rather, the evidence shows that he merely shot Brau in order to facilitate the robbery.[11] This evidence is, therefore, irrelevant to the sentencing concerns recognized by the Supreme Court. *See Franklin v. Lynaugh*, 487 U.S. 164, 184; *see also Skipper v. South Carolina, supra*; *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (heart of retribution rationale is that sentence be directly related to the culpability of defendant).

Nevertheless, even if the evidence "that [Robertson] had been terrorized during his early childhood by an abusive, alcoholic father,

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[11] Several witnesses (including some of Robertson's) testified that although Robertson used drugs, they did not know him to be an addict, and that, in any event, Robertson did not have trouble controlling his behavior. *See* 62 SR 137, 154; 63 SR 87, 114, 135, 150. However, Robertson himself attributed his actions to his drug problem. *See* 59 SR 23, 26 (relating to the Brau and Hill murders); 63 SR 52 (relating to the 7-11 murder).

had a significant drug problem, and was generally polite and respectful" had some constitutionally relevant mitigating aspect, that aspect could be given effect under the two special issues submitted.

B. The evidence could be considered under the two special issues.

Robertson cannot demonstrate a "reasonable likelihood" that the jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (citing *Boyde v. California*, 494 U.S. 370, 380).

The requirements of the Eighth Amendment are satisfied if the mitigating value of constitutionally relevant evidence, as actually proffered at trial, is within "the effective reach" of the jury in responding to the statutory punishment issues and instructions. *Johnson v. Texas*, 509 U.S. 350, 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). Mitigating evidence is beyond the effective reach of the sentencer only if there exists a reasonable likelihood that the jurors would have considered themselves foreclosed from considering the mitigating evidence in answering the special punishment issues submitted to the jury. *Johnson v. Texas*, 509 U.S. 350, 368-369. Further, "[i]n evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 509 U.S. 350, 368 (quoting *Boyde v. California*, 494 U.S. 370, 381).

As previously noted, Robertson's jury was asked to answer two special issues at the punishment phase of trial. The first special issue asked, "Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Mark Robertson, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" The second special issue asked, "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Mark Robertson, would commit criminal acts of violence that would

constitute a continuing threat to society?" The evidence this Court decided could not be given effect through similar special issues given in Penry's case, that is, the evidence that Penry had organic brain damage, a 54 IQ, and no ability to learn from his mistakes, was simply not present in the instant case.[12]

In contrast, to Penry, Robertson was regarded as highly intelligent and was characterized, as, at least when he was off drugs, able to conform his conduct to the law. 63 SR 14, 46, 49, 78, 87, 104, 147. Further, Robertson's drug problem, unlike permanent brain damage, was treatable. Obviously, all of this evidence, as well as that of Robertson's childhood abuse and polite and respectful nature, could be considered under the two special issues given. The evidence of Robertson's good conduct around adults, for instance, is relevant to appropriate sentencing concerns to the extent it demonstrates that the "criminal conduct was an aberration from otherwise good character." *Boyde v. California*, 494 U.S. 370, 382 n.5 (1990). And this is precisely what defense counsel argued. *See* 65 SR 81-82 ("There are two Mark Robertsons that you have heard about. You have heard about the young man who is a loving son, neighbor, sibling." "Then all of a sudden, for ten days in August of 1989, you have a young man who does horrible things. These are horrible things. It's the same person. You know it is.").

Defense counsel essentially argued that the abuse Robertson suffered as a child, never resolved, caused the drug use, and that the drug use was in turn the catalyst for Robertson's deadly crime spree in August of 1989. 65 SR 87-89. Characterizing the events of August

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[12] In fact, it can be inferred from the record that no such evidence existed. Towards the end of its case on punishment, defense counsel made a motion for continuance so that testing could be done to discover whether Robertson, like Penry, had organic brain damage. At the hearing on the motion, Dr. J. Douglas Crowder, who had examined Robertson on his drug use and the effect of that use, expressed his medical opinion that further tests (an MRI, quantitative EEG and neuropsychological testing, which could be done by a Dr. Fulbright the next day) were necessary to confirm or deny indications he (Crowder) had that there was a possibility that Robertson had organic brain damage. The trial court granted the continuance so that the testing could be completed. 65 SR 55. When the trial was resumed, the defense, rather than presenting evidence from either Crowder or Fulbright, immediately rested its case. 65 SR 56.

1989 as "irrational drug-induced actions," defense counsel argued that there was not deliberation involved. 65 SR at 92. This evidence could logically be considered under the first special issue. Aware that the jury had been inundated throughout the trial with extensive testimony suggesting that Robertson was willing to go into drug treatment, but needed the structure of a lock down facility, defense counsel argued that in the controlled environment of prison, Robertson had not been and would not be a future danger.[13] 65 SR 92-93. This evidence was naturally relevant to the second special issue. *See Franklin v. Lynaugh*, 487 U.S. 164, 177-80 (evidence of good disciplinary record while incarcerated is character evidence relevant to capital defendant's likely future behavior). Again, the evidence in *Penry* suggested that Penry's mental retardation rendered him unable to learn from his mistakes. As a consequence, this Court decided the mitigating evidence was relevant to the second special issue "only as an aggravating factor because it suggests a 'yes' answer to the question of future dangerousness." *See Johnson v. Texas*, 509 U.S. 350, 365, 369. In this case, as discussed *supra*, the evidence Robertson points to was not relevant to the future dangerousness special issue *only* as an aggravating factor. The jury, had it been so inclined, could have concluded (as it was invited to) that Robertson's crimes were fueled by methamphetamine addiction; that Robertson's crimes were not reflective of his polite and respectful nature (as attested to by Robertson's multiple witnesses at punishment); and that Robertson, in the controlled environment of prison, would simply not be a future danger.

For these reasons, even if Robertson's jury had not been specifically instructed to consider mitigating evidence in answering the special issues, as was the case in *Penry*, this claim would not warrant certiorari review by this Court. Nonetheless, assuming arguendo that any mitigating aspect of this evidence was beyond the scope of the two special issues, the supplemental instruction provided the jury with an adequate vehicle to consider it.

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[13] Robertson spent considerable time in several different drug rehabilitation programs, but eventually dropped out or walked away from most of them. *See* 61 SR 111, 122; 63 SR 56-58, 65, 140.

C. *The supplemental instruction provided an adequate vehicle for the consideration of mitigating evidence.*

As previously noted, Robertson's jury was asked to answer two special issues at the punishment phase of trial. The court's general instructions preceding the special issues provided, in relevant part:

> You are instructed that you shall consider any evidence, which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to an aspect of the defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence, which in your judgment, has no relationship to any of the special issues, but if you find such evidence is mitigating under these instructions, you shall consider the following instructions of the court. You and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the special issues, deserves.
>
> You are instructed that some mitigating evidence, if any, may not be relevant to resolving the special issues but may be relevant in determining whether or not the defendant should be put to death.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at

> least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

Tr 313-14.[14] The supplemental instruction clearly directed the jury to consider mitigating evidence and to give Robertson a life sentence if it found that evidence sufficiently lessened his moral culpability, regardless of the two statutory special issues. Robertson does not dispute this. Rather, his sole complaint is that the supplemental instruction could not constitute an adequate vehicle because it was an unconstitutional "nullification" instruction under *Sparf v. United States*, 156 U.S. 51 and *Roberts v. Louisiana*, 428 U.S. 325.

Initially, in a dissenting opinion, disagreeing with the plurality's finding that the petitioner's proffered evidence did not have mitigating value beyond the scope of the Texas special issues, three members of this Court specifically suggested the use of an instruction nearly identical to that provided in the instant case to cure an infirmity where proffered evidence did have mitigating value beyond the scope of the Texas special issues.

> Petitioner therefore was at least entitled to an instruction informing the jury that it could answer one of the issues "no" if it found by that evidence that petitioner's character was such that he should not be subjected to the ultimate penalty. The failure to give such an instruction removed that evidence from the sentencer's consideration just as effectively as would have an instruction informing the jury that petitioner's

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[14] This instruction did not include the less than artful phrase ("as reflected by a negative finding") which appeared in the instruction given in Penry's retrial ("*Penry II*"), and which is now under review by this Court. *See Penry v. Johnson*, 215 F.3d 504, 508 (5th Cir.), *cert. granted*, 121 S.Ct. 563 (2000).

character was irrelevant to its sentencing decision.

Franklin, 487 U.S. at 192-93 (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting).

In any event, this case is clearly distinguishable from *Roberts*. In *Roberts*, this Court declared unconstitutional Louisiana's mandatory death sentence statute because it failed to comply with the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. *Roberts*, 428 U.S. at 334. Under the Louisiana system, once a jury found a defendant guilty of first-degree murder, the defendant would be automatically sentenced to death; however, the jury in every first-degree murder case was instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there was not a scintilla of evidence to support the lesser verdicts. *Id.* At the same time, however, the jury was instructed "to return a guilty verdict for the offense charged if warranted by the evidence and to consider lesser verdicts only if the evidence does not justify a conviction on the greater offense." *Id.* at 334 n.10. This Court found that there was "an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Id.* at 335.

Unlike Roberts, the jurors in the instant case were neither instructed nor invited to disregard the law, the instructions, their oath, or the evidence; instead, the jury was instructed how to obey the law (as decided by this Court and set forth by the trial judge) by imposing a life sentence (by answering at least one of the Special Issues "No") if the jury found that such was appropriate.

Further, *Roberts* is entirely irrelevant in light of the material differences between the capital sentencing at issue in *Roberts* and the Texas scheme. While *Roberts* involved a mandatory capital sentencing statute, Robertson's trial was bifurcated into separate guilt-innocence and punishment phases.

> Elimination of the mandatory-sentencing procedure also eliminates the problem of the possibility of jury nullification which has been known to arise under mandatory schemes. If a jury does not believe that a defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense. . . . The guided-discretion statutes that we have upheld . . . . provide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other.

Sumner v. Shuman, 483 U.S. 66, 85 n.13 (1987) (citation omitted); *see also Graham v. Collins*, 506 U.S. 461, 486 (1993)(Thomas, J., concurring) (Mandatory death statutes like those in *Roberts* were invalidated for three reasons, one being that "experience had suggested that such statutes 'simply papered over the problem of unguided and unbridled jury discretion' by provoking arbitrary jury nullification") (citation omitted).

Because Robertson's trial was bifurcated, and because the jury was able to exercise guided discretion at the punishment phase, it was empowered to effectively assess a life sentence without resort to nullification of the law as defined by this Court's jurisprudence. Thus, the concerns of *Roberts* are not present. Alternatively, because the instruction given in this case did not encourage the jury to avoid the controlling law, but rather told the jury how to obey the law as explained by this Court in *Penry*, the concerns of *Sparf v. United States*, 156 U.S. 51, are likewise not present.

For all of the above reasons, the lower courts' rejection of Robertson's claim concerning the punishment phase jury instructions was entirely correct under the AEDPA standard of review. This case does not present facts "materially indistinguishable" from this Court's

precedent. And, even assuming *arguendo* that the underlying state court decision was erroneous, it certainly was not objectively unreasonable.

IV.

ROBERTSON HAS NOT SATISFIED THE STANDARD FOR OBTAINING A STAY OF EXECUTION.

Robertson is not entitled to relief on his application for stay of execution. In deciding whether to grant a stay, the Court is guided by the following standard:

> [T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983) (citations omitted). Because it is clear that the courts below correctly resolved the issues presented and that their resolution only involved the application of well-established precedent to the facts of this case, it is highly improbable that certiorari will be granted, much less that the decision below will be reversed. *See Miller v. Johnson*, 200 F. 3d 274 (5th Cir.), *cert. denied*, 121 S.Ct. 122 (2000); *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied* 525 U.S. 969 (1998). Robertson thus cannot satisfy the standard for obtaining a stay.

V.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Robertson's petition for writ of certiorari and motion to stay execution be denied.

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